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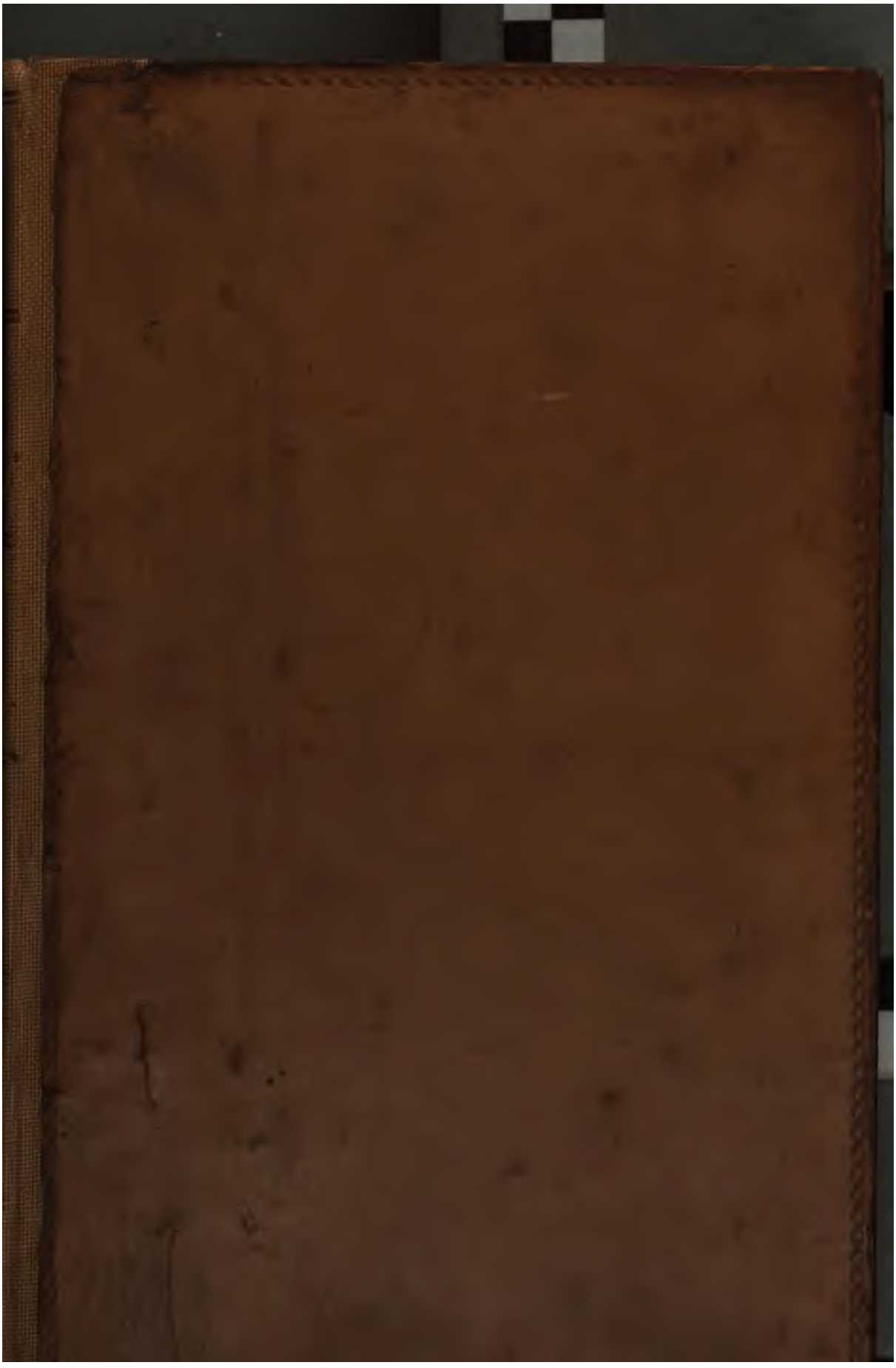

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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF ADMIRALTY;

COMMENCING WITH THE

JUDGMENTS

OF

THE RIGHT HON. SIR WILLIAM SCOTT,

Michaelmas Term 1798.

By CHR. ROBINSON, LLD. ADVOCATE.

VOLUME THE FIFTH.

LONDON:

PRINTED BY A. STRAHAN,
LAW PRINTER TO THE KING'S MOST EXCELLENT MAJESTY,
FOR J. BUTTERWORTH, AND FOR J. WHITE, FLEET-STREET.

1806.

ADVERTISEMENT.

AT the cloſe of the Fourth Volume of the Reports of the late War, the Engagements of the Editor ſeemed, for a time at leaſt, to have terminated, with the ſubject matter on which they had been employed. The Recommencement of Hoſtilities has opened ſources of freſh materials; and, under the ſame hope of contributing uſefully to the ſtock of public information, this Work is again reſumed, and will proceed in the ſame order and form, and under the ſame general aſſurances that were originally profeſſed.

During the progreſs of a work of this kind, the taſk of ſelection leads gradually to the exerciſe of a more minute diſcretion, upon which, different judgments may occaſionally be formed, as to the relative importance of particular Caſes. All difficulty of explanation, however, on this point, will be beſt relieved, by adopting the words of Lord Bacon, who, with reference to another ſcience, thus diſtinctly marks

the rule, which will, with equal propriety, apply to all works of a ſimilar deſcription: "We do not "mean that this work ſhould extend to every com- "mon caſe that happens every day, which were an "infinite labor and to little purpoſe, nor yet to "exclude all but prodigies and wonders; for many "things are new in their manner and circumſtances, "which are not ſo in their kind; and he who looks "attentively, will find many particulars worthy of "obſervation, in what ſeems common."

Advancement of Learning, p. 144.

Doctors Commons, Feb. 23, 1805.
Oct. 22, 1806.

TABLE

of

CASES REPORTED IN VOL. V.

	Page
ABBY, *Murchy*	251
ADONIS, *Gollſchalk*	256
ANNA, *La Porte*	373
ANNE, *Bicknell*	100
APOLLO, *Karſdadt*	286
BETSEY, *Wimpenny*	295
BOEDES LUST, *Sybrandts* -	233
CARLOTTA, *Paſqual*	54
CATHARINA ELIZABETH, *Le Grange*	232
CHARLOTTE, *Focks*	275
CHARLOTTE, *Koltzenberg* -	305
CHARLOTTE, *Witt*	280
COMET, *Adams*	285
CORNELIS AND MARIA, *Zortlief*	28
DIE FIRE DAMER, *Gieſe*	357
DIANA, *Runke*	60
Second Queſtion, in the ſame Caſe	67
DRIE GREBROEDERS, *Vandyke*	339
DRIVER, *Caſhman*	145
ELSEBE, *Maas*	173
FADRELANDET, *Hoop*	120
FAMA, *Butler*	106
FORTUNA, *Rhode*	27
FREDERICK, *Worth*	8
FREYA, *Jordt*	75
JAN FREDERICK, *Bloedorne* -	128
JEUNE VOYAGEUR, *Guerard* -	1
INDUSTRIE, *Rolff*	88
JONGE AREND, *Knowles* -	14
JONGE BASTIAAN, *Slegting* -	322
JONGE KLASSINA, *Bol*	297
JUFFROW CATHARINA, *Hanſen* -	141
KARASAN, *Yeuſef*	291
LA FLORE, *Fils*	268
LA GLOIRE, *Limouſen* - -	192
LA VIRGINIE, *Coigneau* - - 98,	124
LIESBET VAN DEN TOLL, *Teeſt*	283
LOUIS,	146
MARIA, *Jackſon*	365
MARIAMNE, *Morel*	9
MARY, *Folger*	400

8° Jur.

A. 19. 82

L.L

CW .U.K.
100

R.5c

NAMES OF CASES CITED.

Hoop - - - 75
Huldah - Page 145
John Patrick - - 381
Jonge Lambert - - 54
Juffrow Catherina - - 21
Maaſtroom - - - ib.
Mercury - - - 400
Negotie en Zeevaart - - 129, 234
Neptune - - Appendix, Part 2.
Odin - - - - 43
Oſpray - - - 8
Perſeverance - - 294
Picimento - - - 253
Polly, Davis - - - 147
Polly, Laſky - - - 399
Praris v. *Martin* - - 293
Providentia - - 309
Rebecca - - - 43
Regiſter Caſes - - 161, 167
Reſpect - - - 370
Rowena - - - 370
Sally, Griffiths - - 111
Santa Bona Ventura - - 98
St. George - - - 316
St. Johannes - - 188
St. Salvador - - 189
Superb - - - 19
Thomas and John - - - 56
Vierge Mary - - - 310
Vreede, Scholtys - - 5
Vrow Henrietta - - 75
Whitehill's Caſe - - 65
William - - - 316
Wroughton againſt Mann - 117
Yda & Kingma - - 131

CASES reported in the former Volumes, and ſince heard on Appeal.

BEFORE THE LORDS COMMISSIONERS OF APPEAL IN PRIZE CAUSES.

Anna Catharina, Wupper, 16th Nov. 1805	Affirmed.
Argo, Smith, 6th May 1802 - - -	Affirmed.
Betſey, Murphy, 22d June 1799 - -	Affirmed.
Cape of Good Hope, 24th May 1802 -	Affirmed.
Columbia, Weeks, 12th Auguſt 1801 -	Affirmed.
Conqueror, Tate, 29th March 1803 -	Affirmed.
Edward, Bartelt, 24th November 1804 -	Affirmed.
Eenrom, Frontier, 27th March 1802 -	Affirmed.
Embden, Meyer, 10th February 1800 -	Affirmed.
Graaf Burnſtorff, Belmer, 23d April 1803	Affirmed.
Haabet, Vette, 16th Auguſt 1803 - -	Affirmed.
Harmony, Bool, 11th July 1803 -	Affirmed.
Joſephine, Fiſh, 9th July 1803 - -	Affirmed.
Maria, Paulſen, 2d July 1802 - -	Affirmed.
Nancy, Joy, 17th December 1802 -	Affirmed.
Nancy, Knudſon as to the Cargo, 5th April 1803 -	Affirmed.
——, as to reſtitution of the Ship, - - -	Reverſed.
Orion, Cuſhing, 29th March 1804 -	Affirmed.
Perſeverance, Sneydan 10th Aug. 1803 -	Affirmed.
Rendſburg, Nyberg, 11th Aug. 1803 -	Affirmed.

Roſalia

ERRATA IN VOL. V.

Page 9. line 11. *for* as *read* to be
13. — 16. *for* on *read* to
22. — 5. *for* on *read* in
57. Note, line *penultim dele* comma
67. line 7. *inſert* comma *after* condemned
67. *for* diſtinction *read* deſtination
105. — 7. from bottom *for* this *read* the
106. — 13. *for* le *read* de
112. line *penult for* locked *read* looked up
114. — 25. *inſert* id *before* conceditur
129. — 5. *for* charge *read* change
130. — 24. *dele* comma
143. — 4. *for* prize act *read* inſtructions to privateers
143. — 11. *inſert* in *after* captor
144. — 5. *for* prize act *read* inſtructions
144. — 8. *dele* among
148. — 2. *after* ſhip *inſert* the Glenmore
162. — 19. *inſert* into *after* entered
178. — *ult. for* procured *read* ſo iſſued
347. *ante penult, for* Whitehead, *read* Whitehill.

REPORTS

OF

CASES

DETERMINED IN THE

HIGH COURT OF ADMIRALTY.

&c. &c. &c.

THE JEUNE VOYAGEUR, GUERARD.

Sept. 6th, 1803.

Recaptured from the enemy — Restitution to former *British* owners, under the Prize Act, is confined to captures during the war; *not* to be extended to a vessel, confiscated in time of peace, for a violation of the Revenue Laws of France.

THIS was a case of a *British* ship that had been seized in a *French* port *March* 1802, and had been condemned for an asserted violation of the *Navigation Laws of France.* It had been purchased under that sale by a *French* merchant, and was captured on a voyage between two *French* ports, since the commencement of hostilities against *France.* A claim was given on the part of the former *British* owner, praying to have the ship restored to him on salvage.

On the part of the claim, Sewell stated the circumstances of the case, and submitted to the Court, whether the restitution on salvage, directed by the Prize Act, might not be extended to the relief of a person whose property had been violently and unjustly

The JEUNE VOYAGEUR.

justly taken from him in a *French* port, and was now retaken by a *British* subject.

Sept. 6th, 1803.

JUDGMENT.

Sir *W. Scott.* — I am clearly of opinion, that it is not in the power of the Court to give this relief. The provisions of the Prize Act apply to goods taken by the enemy as prize, and direct, with regard to such property, that, on recapture, it shall revert to the former *British* owner. This ship was seized, not in any manner as prize, but for an alleged violation of the Revenue Laws of *France*, in a time of absolute and entire peace. Whether the condemnation in the *French* Court proceeded on just grounds or not, is a question which I am not competent to try; more especially in the *ex parte* manner in which it must unavoidably come forward, there being no persons present on the part of the *French* Court to defend the proceedings which have taken place. The seizure and condemnation, in time of peace, will have the effect of working an entire defeazance of the *British* title; and the ship must be condemned to the captor, as property of the enemy, taken in the ordinary course of prize.

THE VROW ELIZABETH, PROBST.

Sept. 6th, 1803.

Effect of the flag and pass of the enemy, conclusive as to the character of the ship — not *conclusive* against the *claim* of the same owner, for an undivided share of the cargo.

THIS was a case of a ship taken under a *Dutch* flag and pass, on a voyage from *Surinam* to *Holland*. A claim was given on the part of Mr. ———, a merchant of *Bremen*, stating "the ship to

to have been *bonâ fide* his property, though nominally transferred to a *Dutch* merchant, and placed under a *Dutch* flag and pass, for the purpose of enabling her to trade between the *Dutch* colonies and *Holland.*

The ELIZABETH, Sept. 6th, 1803.

On the part of the Captor, the King's Advocate. — The master has in his deposition stated the ship to belong to the owner in *Holland;* he cannot therefore now be heard to explain away that evidence, and assert a claim for another person. Independent of all objections to testimony, however, the mere sailing under the flag and pass of the enemy is, in point of law, decisive to fix the character of the ship, and to subject her to be condemned as a *Dutch* ship.

On the other side, Laurence and Robinson. — The discredit of the master will not preclude the owner from asserting a fair claim, more especially when a foundation is laid for such a suggestion, in the evidence of the other witnesses, who speak of Mr. *N*——— as being in reality the owner. The principle of law that has been relied on, applies to cases arising in time of war. The circumstance of existing hostilities may impose a peculiar obligation on neutral merchants, to keep their titles of property distinct, and free from any intermixture of enemy's interest, even in appearance; but where no such special reason exists, the principle does not apply with equal propriety, to govern cases of an assumed character in time of peace; where the flag and pass have been adopted without any contemplation of war, and for reasons arising only out of the

The ELIZABETH.

Sept. 6th, 1803.

internal regulations of *Holland*. If this practice of transferring a *Dutch* character to neutral ships, is in any degree a fraud, it is not against this nation, nor against the rights of war, which it is the *peculiar* province of this Court to enforce. It can amount to nothing more than to a fraud on the Navigation Laws of *Holland*, which we are in no degree concerned to protect. In the case of the (*a*) *Clarissa*, *Symonds*, Mr. *Brown*, a part owner, resident in *America*, obtained restitution of his share of the ship, although the vessel had sailed from *Holland* under a special pass or *licence* of adoption, entitling her to engage in the colonial trade of *Holland*, which had before been appropriated exclusively to *Dutch* ships.

(*a*) Adm. 26, *June* 1800.

JUDGMENT.

Sir *W. Scott*. —This application appears to me to be against the evidence of fact, as well as against the settled principle of law. The vessel was sailing under *Dutch* colours from *Surinam* to *Amsterdam*, with a *Dutch* pass, and all other papers, representing her to be a *Dutch* ship; and this description is confirmed by the deposition of the master, who states her to be a *Dutch* ship, the property of Mr. *Gildermester*. The evidence on the fact then is, that she is a *Dutch* ship; to this nothing is opposed, but the account of two other persons, who, though *competent witnesses*, are certainly inferior to the master, both with regard to the credit due to them, and to their opportunity of knowing the real fact. It would, I think, be extremely hazardous to admit a claim in opposition to this evidence. I will go farther, and say, that I hold the claim to be also against the established rules of law; by

by which it has been decided that a vessel, sailing under the colours and pass of a nation, is to be considered as clothed with the national character of that country. With goods it may be otherwise(*a*), but ships

The ELIZABETH.

Sept. 6th, 1803.

(*a*) In the case of the *Vreede Scholtys*, the claim of Mr. *Dede*, for a share in the ship taken under a *Dutch* flag and pass, was rejected. On the part of the captor it was farther objected, as to the cargo, that the claim of the same gentleman for *an undivided* part of the cargo documented as *Dutch* property, must be precluded also by the *Dutch* character, and by incorporation into *Dutch* commerce. The Court overruled this objection, observing, "A great distinction has been always made by the nations of *Europe*, between ships and goods. Some countries have gone so far as to make the flag and pass of the ship conclusive on the cargo also, but this country has never carried the principle to that extent. It holds *the ship* bound by the character imposed upon it by the authority of the Government from which all the documents issue. But goods which have no such dependence upon the authority of the State, may be differently considered. Then comes the question whether the Court will make the separation. Generally, it cannot be doubted, that such separation may be made. It is in every day's practice to make such distinctions. Are there, then, any particular circumstances to prevent the Court from doing it in the present instance? Has the claimant assumed the character of a *Dutchman*, so as to render the property liable to be considered as *Dutch* property? I know of no case that has fixed such a consequence upon a transaction of this kind in time of peace. On the contrary, we all remember the cases of the *Swiss*, who had shipped property from *Curaçoa* under *Dutch* names, to avoid the Alien Duties, and yet obtained restitution of their claims. Had the trade in the present instance been even an exclusive trade, it might have been questionable, how far the party could have been held to the Dutch character merely on account of a false representation practised against the *Dutch* revenue laws — unless, indeed, it had appeared that there had been some pass or licence conferring on him the special privileges of a *Dutch* merchant, or unless it was a trade arising out of the circumstances of war, or the expectation of such an event. Here the party appears only to be availing himself of *Dutch* names in time of peace for the benefit

Sept. 6th.

Jan. 10th. 1804.

The ELIZABETH.

Sept. 6th, 1803.

ships have a peculiar character impressed upon them by the special nature of their documents, and have always been held to the character, with which they are so invested, to the exclusion of any claims of interest, that persons living in neutral countries may actually have in them. In the war before the last, this principle was strongly recognized in the case of a ship taken on a voyage from *Surinam* to *Amsterdam*, and documented as a *Dutch* ship. Claims were given for specific shares, on behalf of persons resident in *Switzerland;* and one claim was on behalf of a lady, to whom a share had devolved by inheritance, whether during hostilities or not, I do not accurately remember; but if it was so, she had done no act whatever, with regard to that property, and it might be said to have dropt by mere accident into her lap. In that case, however, it was held that the fact of sailing under the *Dutch* flag and pass was decisive against the admission of any claim; and it was observed that as the vessel had been enjoying the privi-

---

of avoiding particular duties; in such a case it would be going farther than the Court has hitherto gone, to declare that the person is to be held to all the revolutions which may attend the *Dutch* character. In time of war a more strict principle may be necessary. But it is needless to decide what considerations might be fit to be applied to such a transaction in time of war; as this case arose altogether in time of peace, and without any expectation of war. I see nothing to prevent the Court from performing the office of separating this undivided share; and as the property is fully proved, I shall decree it to be restored.

So, in the *Broders Lust*, Mr. *Richter*, part owner of the ship, *and supercargo on board the vessel*, obtained restitution of his claim for parts of the cargo, though his claim as to the ship was rejected.

leges

The ELIZABETH, Sept. 6th, 1803.

leges of a *Dutch* character, the parties could not expect to reap the advantages of such an employment, without being subject at the same time to the inconveniences attaching on it. When I lay down this rule, I do not say that there may not be cases of such particular circumstances, as to raise a reasonable distinction. The treaty of *Amiens* had stipulated for the liberty of withdrawing *British property* from the ceded and restored islands. But the Governments of *France* and *Holland* afterwards refused to suffer such property to be exported from these colonies, otherwise than in ships of *France* or *Holland*, and on a destination to those countries. The difficulty which has arisen in the removal of *British* property, for want of shipping, may have induced our own Government to permit *British* ships to put themselves under *Dutch* flags for this particular purpose; and in such cases the particular situation of affairs arising out of this refusal to execute the treaty, may have entitled such parties to a relaxation of the general rule. (*a*) But no ground of exemption whatever is stated in the present claim—nothing more than that the claimant found it *convenient* to place his vessel under the *Dutch* character: To which the answer is obvious, that with the *convenience* he must take also the *inconvenience* attend-

(*a*) In the *Onderneeming*—A British subject obtained restitution of seven-eighths of the ship, under a *Dutch* flag and pass.—The King's instructions, 23d *July*, 1803, direct "Restitution of ships and cargoes, *bonâ fide belonging to British subjects*, sailing, before the knowledge of hostilities, from the colonies of *France* and *Holland*, to whatever country they might be going."

The ELIZABETH.

Sept. 6th, 1803.

ing such an act. The case referred to in the argument has nothing in common with the present claim. In that case the ship had merely a colonial pass or licence, being in all other respects undoubtedly and avowedly an *American* ship, and described as such in the usual *American* documents. This ship has all the documents of a *Dutch* ship, and I have no hesitation in pronouncing her subject to condemnation.

Sept. 7th, 1803.

THE FREDERICK, WORTH.

Mariners character, concluded by the character of the ship. *Shares* of master and mariners, American subjects, on board a *French* whale-ship, condemned.

THIS was a case of a *French* whale ship, that was taken on a voyage to the Southern whale-fishery and back to *L'Orient.* The master claimed specific shares (*a*) of the cargo, as the property of himself and the officers and crew of his vessel, *asserted subjects of America.*

The King's Advocate contended,—That the character of the master and mariners were to be taken from that of the ship, and that they were precluded from claiming wages on board an enemy's ship.

Contra. Laurence cited the cases of the Ospray and the Industry in the last war (in which the master's adventure had been restored), and contended,—That as the claimants had engaged in this trade only in time of peace, it was reasonable that they should be allowed some time to withdraw themselves and their property, without being bound *instanter* to all

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(*a*) Master, 1-14th.—Mate, 1-25th.—2d Mate, 1-35th.—3d Mate, 1-50th.—3 Mariners, each 1-85th.

the

the disabilities of a *French* character, from a mere temporary service on board a *French* ship.

The FREDERICK.

Sept. 7th, 1803.

JUDGMENT.

Sir *W. Scott.*—I have no hesitation, in pronouncing that these persons cannot be admitted to claim: They are to be considered as mariners; and this proportion of the proceeds of the voyage, as their wages. Then can a claim be sustained for wages, on board an enemy's ship? In the cases cited, the ships were either *really* or *ostensibly American* ships, which might entitle the persons serving in them, in that character, to a different consideration. The present vessel is avowedly a *French* ship, and these persons must be taken as *French* sailors. There is indeed less reason for any relaxation of the general principle in this branch of navigation, than in any other; because the *ratio* of wages is a material part of the trade itself, being the ordinary mode of carrying on that particular species of commerce.

THE MARIAMNE, MOREL.

Sept. 9th, 1803.

Letter of marque, forfeitable for acts of *Cruelty*—Proceedings on that ground, on the part of the admiralty, not substantiated in the present case.

THIS was a case arising on a representation, made by the master of the captured vessel, to Captain *Trower* of the King's ship the *Lark*, that one of two privateers that were the actual captors, had fired into the ship after the surrender, and by that act had killed one of the men. On this representation, a proceeding was instituted on the part of the Admiralty, against the privateer, to deprive her of her letter of marque. It appeared that the two privateers had

The MARIANNE.

Sept. 9th, 1803.

had dogged the prize from ten o'clock, A.M. till about two, and were close under her stern when she surrendered; that they immediately boarded and took possession. The *Lark* had come in sight about an hour before the capture, and the master of the *French* ship deposed, "*that he struck to the Lark,*" though at a considerable distance at the time of surrender. In consequence of the representation of this witness, Captain *Trower* dispossessed the prize-master, and put his own men on board, and communicated to the Admiralty the information on which this proceeding was grounded.

JUDGMENT.

Sir *W. Scott.*— This is a proceeding in order to deprive a privateer of her letter of marque, in consequence of improper conduct. The fact alleged is of a very atrocious kind, and would, certainly, if proved, draw with it all the consequences that have been pressed against the parties. During the contest, destruction is necessary and lawful; but it is contrary to every principle of the law of nations, that, after the contest has ceased, hostile and destructive force should still be continued. The only thing that I have to consider is, the proof of the fact, because the law is laid down by the Prize Act, which expressly inflicts upon all acts of cruelty, *the forfeiture of the letter of marque;* and *this*, I consider to be no more than a formal declaration of what was the ancient law of the Admiralty.

On the fact, which the use of this unnecessary violence would amount to, I cannot say that it is in any degree satisfactorily established. In the first place

place it must be considered as *a very unnatural conduct*, and as such, it will not unreasonably require strong evidence to support the accusation. No advantage could be derived from it; on the contrary, it would be likely to produce great inconvenience to the parties themselves, who were injuring that which was now in their possession, and in a certain degree their property. It is not very congenial to the known practice and disposition of *British* sailors. These considerations very much heighten the incredibility, and call for some very strong testimony to sustain the charge. All the evidence that is produced on that side, consists of the affidavits of three *French* seamen, and of the observation made by a *British* officer, on the appearance of the *French* vessel after the capture. The *French* captain's deposition in preparatory, by no means comes up to the allegation. He says, "that he struck to the *Lark*, at the time when the two luggers were firing into his ship:" this is a very different thing from a shot fired after the surrender was clearly notified and understood, and can never constitute a ground for penal proceedings against the captors. The two other witnesses were not examined till nearly three weeks after the capture. They do indeed lay some foundation for the representation made by Captain *Trower*. The mate of the *Lark* also states, in his affidavit, "that he perceived the body of a man upon the deck, warm and with the blood flowing;" but the effect of this representation is very much weakened by what ensued. It might reasonably be expected, that the first *topic* started, after the mate came on board, would have been a formal remonstrance and complaint,

The MARIAMNE. Sept. 9th, 1803.

complaint, on the part of the master of the *French* merchantman, against such conduct. But not a word passed upon the subject; nothing transpires till after some time had elapsed, and, after an altercation had taken place between Captain *Trower* and the master of the privateer, respecting the possession of the vessel. It seems, that the *French* master was ambitious to strike to a King's ship, agreeably to what we have seen in other cases of a prevailing(*a*) vanity of this kind: They prefer a submission to a more splendid victor. He says, "that he could have escaped the privateer, if the *Lark* had not cut off his retreat into a *French* port." Of that there may be reason to doubt. However the *Lark* came in sight; the privateers, which had been chasing for some time, and before the *Lark* came in sight, got first on board, as they had a perfect right to do. It must not be imagined that there is, in this respect, any difference between a King's ship and a privateer. They are both engaged in the same contest; they both represent the public force of the country, and are both armed with public authority. The privateer coming up first had a right to take possession, and if resistance had been offered by the *French* captain, it would have justified any violent consequences that might have ensued. The enemy has not a liberty of choosing to whom he will surrender; when the surrender is once compelled, he is bound to submit to the first armed cruizer that comes up. Considering the temper displayed by the *French* master, and seeing that his testimony is positively

(*a*) Instances of a similar prejudice occur in proceedings in the earlier part of the last century.

contra-

contradicted by other parts of his own crew, (who have united in an affidavit, stating, "that the person supposed to have been shot after the surrender, had, in fact, fallen some time before, and during the engagement,") I am of opinion, that it is by no means satisfactorily proved, that an act was committed which would not only produce the penal consequences alluded to, the forfeiture of the letter of marque, but would also fix a stigma on the parties for life. At the same time, I impute no blame to Captain *Trower;* he has acted with an honourable zeal for the credit of the public service, on the representation of the *French* master. Had he enjoyed a better opportunity of weighing all the evidence together, he would, perhaps, have found reason to form a different conclusion. There is no reason, however, to impute the least degree of blame to him; neither do I think that the *admonition* called for, on the King's *officers*, is rendered necessary, by any disposition shewn in this case, to arrogate to themselves all prizes made in their presence, to the exclusion of private ships of war, that may happen to be the actual captors. The officers of King's ships must understand, and doubtless do understand, that they have no authority to dispossess privateers. Such vessels are duly commissioned, and represent the public authority. The King has been pleased to communicate his bounty to them, and they stand generally, with respect to an interest in prize, on the same footing, as other parts of the public force of the Country. With regard to the charge alleged, I pronounce it not to be made out, and dismiss the parties.

THE

Oct. 6th, 1803.

THE JONGE AREND, KNOWLES.

Licence, for importation from the enemy on board a neutral ship, vitiated by the ship being *British* property.

THIS was a question respecting the effect of a licence, which had been obtained by *British* subjects, for the importation of sundry articles, from the port of the enemy, "*in neutral ships*;" whether it was to be extended to the protection of such a trade carried on in a *British* ship. The vessel was sailing under *Prussian* colours, and was claimed for Mr. *Abegg*, of *Embden*.

JUDGMENT.

Sir *W. Scott*.—This is a mere question of property as to the character of the ship, since the licence being *for importation on board a neutral ship* cannot afford protection, if this vessel is to be considered as a *British* ship. There are many reasons why Government might not be disposed to permit *British* ships to trade with the enemy, at the same time, that a communication in neutral bottoms might be allowed. It would be infinitely too much for this Court to take upon itself to say, that because Government has admitted the one, the other is to be taken as virtually included. By all the evidence it appears, that this is a *British* ship. The trade which has been carried on, is, therefore, neither protected by the reason, nor by the terms of the licence; and the property must be pronounced subject to condemnation.

THE VROW ANNA CATHARINA, MAHTS.

Oct. 7th, 1803.

Claim of territory, on the part of the Government of *Portugal*, not substantiated as to the fact of the place of capture.

THIS was a case of a ship and cargo, documented as *Dutch* property, and captured on a voyage from *Batavia* to *Amsterdam*, near to the island of *Saint Michael*. On a representation made to the *Portuguese* Government, that the seizure took place within the road, or harbour, of *Saint Michael*, a claim of territory was interposed by the *Portuguese* Consul.

On the part of the Captor, Arnold.—There is no foundation for any such claim on the preparatory *depositions;* all the witnesses "represent the capture to have been made *on the high seas*, as they *were making for Saint Michael* for water, within sight of several ships lying at anchor in the Bay, at the distance of about one *English* league."—The second witness says, "*a little more than a league;*" and the third witness, "*about three English miles.*" The whole of the preparatory evidence gives a different account of the place of capture, from what is now endeavoured to be represented, *as within the roadsted, and whilst the ship was lying at anchor in the port of St. Michael.* To admit other evidence on this point, that has no foundation laid for it in the original case, would be extremely dangerous and unusual. It is therefore hoped that the Court will pronounce this claim to be entirely unsustainable, and reject it with costs.

On the other side the King's Advocate and Laurence.—The distance stated in the deposition is not greater than

The Vrow Anna Catharina.

Oct. 7th, 1803.

than the ordinary extension ascribed to territory, by the law of nations; all that is said is, that the capture was made on the *high* seas, and near to *Saint Michael's*. This description is by no means incompatible with the fact, of its being within the protection of land. Unless the evidence is clearly contradictory to the representation of the claim, the Court would not, in a case of this description, shut out the farther evidence which is now proposed to be offered, in the letter of the *Dutch* Consul at *Saint Michael's*, and the protest entered by the master at the time;—from which evidence it will appear, at least, that this is not an *ex post facto* suggestion, but one arising out of the impression of the parties upon the spot.

JUDGMENT.

Sir *W. Scott.*—The sanctity of a claim of territory is undoubtedly very high. The Court is at all times very much disposed to pay attention to claims of this species, and to none more readily than to those, which concern the territorial rights of the State of *Portugal*. When the fact is established, it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding that it may actually belong to the enemy; and if the captor should appear to have erred wilfully, and not merely through ignorance, he would be subject to farther punishment.

It is to be remembered however, at the same time, that it is a point on which foreign States are extremely liable to be misinformed and abused, by the interested representations of those, who are anxious to catch at their protection. The claim of territory is

The VROW ANNA CATHARINA.

Oct. 7th, 1808.

therefore to be taken as a matter *stricti juris*, and to be made out by clear and unimpeached evidence. The right of seizing the property of the enemy, is a right which extends, generally speaking, *universally*, wherever that property is found. The protection of neutral territory is an exception to the general rule only; it is not, therefore, to be considered as disrespectful to any Government, that the fact on which such claims are founded should be accurately examined.

In this particular instance, it is, I think, very evident, that some kind of misrepresentation has been practised upon the Government of *Portugal;* since there is the widest difference, between the depositions of the captured crew, and the claim that is now offered, on the part of the *Portuguese* Consul, *for this ship, as lying within the roadsted of Saint Michael.* In the affidavit which has been rather irregularly brought in, the utmost that is now averred is, "*that the ship was preparing to anchor, that the crew were clearing the ship,*" which every body knows, is an act usually done previous to the actual arrival in port. This account, however, is very little conformable to the original depositions, which represent the capture to have taken *place about a league, or a little more than a league, from the ships at anchor in the bay.* On this evidence no doubt could be entertained. Then what is since offered? The affidavit represents the distance only as *within three-quarters of a German mile.* The utmost extent which is given to this immunity, even in books, is confined to about three *English* miles; so that, at last, the representation is nearly to the utmost extent of the limits prescribed for claims of this kind, supposing the

The VROW ANNA CATHARINA.

Oct. 7th, 1803.

measure to be minutely ascertained. If the fact had been, that the privateer had made this capture in a neutral port, or whilst lying in harbour, as was done in some of the ports in the north, with a view of making that harbour an habitual station for captures, I should have concurred in reprobating such a practice in the strongest terms; but if, whilst a privateer is accidentally lying there, she sees an enemy approaching, she may go out and capture, I conceive, without any violation of the peace or immunity of the neutral port, provided this is done beyond the limits of the port. If this had been a proceeding originally instituted by the Government of *Portugal*, on the suggestion of the officers of that Government, who had witnessed the transaction on the spot, and had immediately put forward their remonstrances, as happened in some *Danish* claims, there might be ground for admitting a further investigation of the charge. But it is now exhibited only on the representation made by the *Dutch* Consul at *St. Michael*, who may naturally be supposed to be not unwilling to extend to his countrymen any protection that it might be in his power to afford. Under these circumstances the claim of territory, being altogether contradicted by the *preparatory evidence*, must be rejected.

On the merits, it was contended — That all the documents, as well as the depositions of the *Dutch* crew, described the cargo to belong to *Dutch* merchants, and it was prayed that the Court would condemn the ship and cargo as *Dutch* property.

On the other side. — A claim was offered for *A. B.* a neutral merchant, setting forth his interest in the cargo,

The VROW ANNA CATHARINA.

Oct. 7th, 1803.

cargo, under a sub-contract made to him by the *Dutch* merchant, who was the original purchaser in the contract with the *Dutch East-India Company*; and it was contended, that the rule of not admitting claims in opposition to the original papers and depositions, was a rule arising out of the relations of war, and was not to be applied to a transaction which took place altogether in time of peace.

JUDGMENT.

Sir *W. Scott.* — I have never understood that the rule against the admission of claims, which stand in entire opposition to the papers, and to the preparatory examinations, was applicable to cases arising before the war. There may be private reasons to induce merchants to trade under borrowed names, and to suppress the exact representation of the property. In time of war, the rule is certainly otherwise, as it would open a door to fraud in an incalculable extent, if persons were not required to describe their property with perfect fairness. The interests of a third party interpose, and call upon them so to do. It is not any relaxation of the rule, therefore, to admit such a claim for property shipped, and *purchased*, as it is asserted, in time of profound peace. In Mr. *Allwood's* case (*a*) the same distinction was recognized; and indeed the objection has never, to my knowledge, been held to be a decisive objection, as applied to such cases. I shall admit the claim, and give the parties an opportunity of enabling me to form a better judgment of this transaction, by shewing what was the particular nature of this contract (*b*).

(*a*) *Superb*, 6th *Aug.* 1800. — Lords.

(*b*) This property was afterwards restored. *Vide infra.*

Nov. 2d, 1803.

THE PHŒNIX, WILDEBOER.

Produce of the claimant's estate in the colonies of the enemy, subject to condemnation, though it be *bona fide* the property of *claimants personally* domiciled in neutral countries.

THIS was a case of a claim, given on behalf of persons in *Germany*, for property taken on a voyage from *Surinam* to *Holland*, and described to be the produce of their estates in *Surinam*.

On the part of the captors, the King's Advocate relied on this circumstance, that the articles in question were described as the produce of the claimant's estates in the colony of *Surinam;* and contended that it was an established principle of the Prize-Court, that such property was to be considered under the national character of the parent state.

On the other side, Laurence and Robinson. Whatever may have been the strict principle of law in former times, and on ordinary occasions, as to the produce of the claimants' plantations, in the enemy's colony, the circumstances of the present times afford a reasonable ground of distinction. This colony had very lately been in *British* possession; and the Treaty of *Amiens*, that provides for its restitution to *Holland*, stipulates at the same time, that all persons should have three years to remove their effects. This may reasonably be considered as a sufficient ground of equity, to prevent the inhabitants, of any class, from being instantaneously implicated in the war; and should at least entitle them to some time for deliberation, and for withdrawing themselves and their property.

JUDGMENT.

JUDGMENT.

The PHŒNIX.

Nov. 2d, 1806.

Sir *W. Scott.*—If the claimants had averred, that they made their establishment at *Surinam* during the time whilst the colony was under *British* possession, the question would have arisen whether the terms of the Treaty, which are very general, and not confined to *British* settlements only, should be construed to apply to the property of (*a*) all persons making their establishment there during that period. It is *not* averred, that the claimants *had become* possessed of these plantations during that time. They only say, that the plantations had fallen to them by descent and devolution of the estate of a person in *Holland.* Certainly, nothing can be more decided, and fixed as the principle of this Court, and of the Supreme (*b*) Court, upon very solemn arguments there, that the possession of the soil does impress upon the owner the character of the country, as far as the produce of that plantation is concerned, in its transportation to any other country, whatever the local residence of the owner may be. This has been so repeatedly decided both in this and in the Superior Court, that it is no longer open to discussion. No question can be made upon the point of law at this day. In the present case the estates are described to have been acquired by descent; and as such they are by no means marked out as entitled to any favourable distinction. If they had been a late acquisition, there might have been room for the supposition, that they had been acquired whilst the place was in *British* possession, and that the owner had been induced, by that circumstance, to form an establishment there, under the faith and protection of the *British* Government. Having fallen by descent

(*a*) *infra, Diana.*

(*b*) *Maastrom, Juffrow Catharina,* and other cases.—Lords, 1783.

The PHŒNIX.

Nov. 2d, 1803.

scent on these persons from their ancestors in *Holland*, these plantations must be considered to carry with them the disadvantages, as well as the advantages, of the *Dutch* character. Nothing is averred respecting the time of possession, and therefore the question in the Treaty cannot arise. As the produce of the claimants' own plantation in the colony of the enemy, this property must fall under the general law, and be pronounced subject to condemnation.

Dec. 13th, 1803.

THE PLANTER'S WENSCH, TOLL.

Claim on the part of the *Batavian* republic, under the asserted protection of a licence granted by the *British* Government *October* 1801, rejected; the licence not being held applicable to the case of a new war.

THIS was a case of a claim made for property, avowedly *Dutch*, by a person represented as an accredited agent of the *Batavian* Republic. The claim was given for the ship and for parts of the cargo, as sailing under a licence granted by the *British* Government, *October*, 1801.

On the part of the captors, the King's Advocate and Robinson.—This claim is given for a *Dutch* ship sailing under *Dutch* colours, from *Demerara* to *Amsterdam*, and seized (*May*, 1803) prior to hostilities against *Holland*. It is claimed as protected *generally* by the Treaty of *Amiens*, and, 2dly, in a more specific manner, by the licence which was on board. The licence is dated *October*, 1801, and expresses a permission for this vessel to sail from *Amsterdam* to *Demerara*, in the ensuing *April*, in pursuance of the preliminaries of peace. It was granted between the signing of the preliminary articles and the definitive Treaty

The PLANTER'S WENSCH.

Dec. 13th, 1803.

Treaty; and must, in its obvious intent, have been designed only to enable *Dutch* vessels to go to the *Dutch* settlements, whilst still under the dominion of this country, prior to the surrender that was expected to take place on the return of peace; and under an understanding, (as it has been reported,) that the *Dutch* Government would licence an equal number of *English* vessels to go there, after the signing of the Treaty, for the purpose of bringing away *British* settlers and their property. Whatever might be the understanding of the two Governments as to that last article, which was afterwards refused to be carried into effect, it cannot be contended, that a licence, granted at this time, with reference either to the war which was just on the point of being concluded, or to the expected state of peace, should be construed to extend to the protection of *Dutch* property against the events of a future war. Under what views could such an intention be ascribed to Government? The disposition of this country towards *Holland*, with reference to past events, might be well known, and capable of being minutely appreciated. But who could foresee how that disposition might stand affected in the event of a new war? What ground of assurance could there be, if a future war is to be supposed to have been in contemplation, that it might not arise in consequence of some provocation on the part of *Holland?* It cannot be maintained as a sound interpretation of this licence, that it could be supposed to apply to the contingency of a new war.

On the other side, Laurence and Swabey.—This is a capture made before hostilities, and as such, it will

The PLANTER'S WENSCH.

Dec. 8th, 1803.

not vest an interest primarily in the captor, but in the King. If, therefore, any doubt should be entertained respecting the intention and legal effect of the licence, under which this vessel was sailing, it may be a case more fit to be referred to the liberal and merciful consideration of his Majesty. The intention of the licence was very different, as it is understood by the claimant from the construction put upon it by the captors. It was granted during an uncertain state of negociation between the two countries, and with a design that, if that ambiguous situation of affairs should again terminate in war, it might serve for the protection of the vessel sailing under it. Whether it might be fairly construed to extend to hostilities entirely new, and independent of the negociation which was then going on, it may not be necessary to enquire. Since the present war has arisen out of the inefficacy and inexecution of that treaty, the state of affairs between the two countries is rather to be considered in the same light as if the former hostilities had never ceased; and this licence as still operative for the protection of the vessel during the voyage on which she was captured. That the licence had this prospective view to a *renewal* of hostilities, and that it was *not* granted with reference only to the restrictions of the colonial system, is evident from the terms in which it is addressed:—To all "admirals, vice-admirals, cruizers, &c." The parties are therefore entitled to the benefit of its protection from a capture, which is rather to be considered as an act under the continuation of former hostilities, than as proceeding from a new war.

JUDGMENT.

JUDGMENT.

The PLANTER'S WENSCH.

Dec. 13th, 1803.

Sir *W. Scott.*—This claim is given by a Mr. *Apostol*, who is described as the commercial agent of the *Batavian* Republic, though it is not very easy to understand how that character, springing out of the pacific relations of the two countries, can now exist in a time of war. Waving, however, all objection to the political description of this gentleman, I will consider the nature of the claim, and the ground on which it is defended. It is represented as sustainable under the treaty of *Amiens*, and on the special licence which has been produced, As to the treaty of *Amiens*, the argument on that head would amount to this, that all property taken before the actual declaration of future hostilities, should be protected by it;—a position, which it is, in my opinion, impossible to maintain. The second ground is that of the licence;—a protection which, if it could be shewn to apply to this class of cases, would be entitled to the greatest respect, and would certainly meet with every disposition, on the part of the Court, to give it due effect. The licence was granted in *October* 1801, to empower this vessel being a *Dutch* ship to go to the colony of *Demerara*, then in *British* possession, but intended to be restored to the *Batavian* Republic, under the treaty then in contemplation. Whilst the island was in *British* possession, it was certainly an indulgence to allow *Dutch* vessels to sail with this destination, on which they could not have ventured without the special protection of a licence. It must be recollected also, that it was granted during the pendency of the negociation—whilst it was uncertain whether hostilities

The FORTUNA.

Nov. 4th, 1803.

master from making his course to the *Ems*." This is a fact that may admit of specific evidence, and therefore I shall admit affidavits to be offered on that point. In some late cases, I have seen enough to induce me not to admit affidavits on mere matters of conversation, asserted to have passed between the parties at the time of capture. All that is offered from such sources is generally represented so vaguely, and with so much fluctuation, as to disable the Court from extracting any precise information from it. Where a specific fact is relied on, which may be capable of proof, it is a different thing. Considering the reference that has been made to the particular state of the winds in the present case, to be of that nature, I shall admit evidence to be introduced on this point. —

This ship was finally restored.

Nov. 10th, 1803.

THE CORNELIS AND MARIA, ZORTLIEF.

Trade on the part of *British* subjects, beyond the *Cape of Good Hope*, in violation of the *East-India* Company's charter. — Distinction as to a *subcontract* under a commercial adventure of *Dutch* merchants *overruled* — Condemnation.

THIS was a case of a claim given on behalf of Messrs. *Eden* and *Court* of *London*, for a portion of this cargo, taken on a voyage from *Batavia* to *Holland*, as purchased under a subcontract with *Voute* and Co. of *Amsterdam*, who had originally contracted with the *Dutch East-India* Company for the purchase and importation of a large quantity of *Batavian* produce into *Holland*.

On the part of the captor, the King's Advocate and Arnold.—In the first place it is to be observed that the

The CORNELIS and MARIA.

Nov. 10th, 1806.

the claim is against all the evidence, since the whole cargo is represented in the ship's papers, and also in the depositions, as *Dutch* property. But the very nature of the contract, which is now represented to have been made, would subject those goods to be considered in a *Dutch* character, whoever might be the holder of the real interest in them. It is a contract for the sale of *Dutch* colonial produce, under a stipulation that it shall be imported into *Holland* in *Dutch* ships, be deposited in the Company's warehouses, and sold at their sales, bearing from these circumstances every mark of *Dutch* property, and of *Dutch* commerce throughout. As against the claim of *British* merchants, there is also this farther objection, which is itself paramount and fatal, that on the part of *British* merchants, it is a trade directly in violation of the *East-India* Company's charter, which prohibits *British* subjects from trading beyond the *Cape of Good Hope*, unless under a licence from the Company.

33 G. 3. c. 52. sec. 52.

Court.—I should wish the defence to be directed chiefly to that point, because, unless I am satisfied on that, other considerations may be superfluous.

On this point, Laurence and Swabey.—The Acts of Parliament which have been made, from time to time, for the protection of the *East-India* Company's privileges, and are consolidated in the late Act, 33 *G.* 3. *c.* 52., are by no means to be applied to such a case as the present. They forbid *a trade to* the *East-Indies*, which must be understood of a transaction of persons going or sending goods to that quarter

The CORNELIS and MARIA.

Nov. 10th, 1803.

quarter of the world to barter, or purchase for their own account. This is merely a contract for the delivery of certain goods in *Europe*, which were to be paid for in *Europe*. The clause of the Act of Parliament which is referred to, is confined *to such trading as is contrary to that Act;* from which we may infer, that it is not *all* trading to those parts, but only such as is contrary to the intention of that Act, that is to be deemed illegal. Then what was the intention of the Legislature? It was apparently to prohibit such traffic as was connected with *British* navigation, since the penal clause always begins by enumerating the forfeiture of the *ship* (*a*) amongst the penalties attaching on the offence described by that Act; and the words point rather to those personally engaged in such trade, than to persons contracting for a part of such goods when brought to *Europe*. The words of the Act are, "shall sail to, *visit*, haunt, frequent, trade, traffic, or adventure to."

(*a*) Sect. 129.

In reply, it was said, that one condition of the original contract was, that part of the payment should be made in *Batavia*, and in a certain proportion in *European* goods, and that other goods shall be brought to *Holland*. That such a trade came strictly under the terms *trafficking or adventuring to*, both on the part of the original contractor, and also of those who take a subordinate share in the speculation.

JUDGMENT.

Sir *W. Scott*.—This case stands on the admission of a claim, on the part of *British* merchants, for property acquired under the contract which has been before

The CORNELIS and MARIA.

Nov. 10th, 1803.

before described. I shall consider it with respect to *British* merchants only; as particular considerations applying to their case, may make it unnecessary for the present to enter into the other parts of the argument, which are of wide extent, and may perhaps be brought forward again, in the claims of neutral merchants. The original contract which was made between *Voute* and the *Dutch East-India* Company, for want of means to continue their own trade, stipulates, that the goods should be brought to *Holland*, subject to all the regulations of the Company in *Europe;* and with a view of facilitating this project by increasing the capital, a permission is given to the original contractors, to parcel out and distribute a share of this contract to others. Under this power it is that *British* merchants have been let in to partake in this speculation, as merchants call it. That this is a trading contract cannot be denied. It is a trading adventure in the most plain terms; and it has strongly impressed itself on my understanding, that those who are let in to any share of the undertaking, stand on the same ground as the original contractors; and that if it is a trading adventure on the part of the original holders, it must be equally so on the part of those who come in to take a part with them. If I am right in this view of the matter, the only question will be, Whether it is not such a trade as falls directly under the prohibitions of the Act of Parliament. Under the evident *policy* of the Act, it appears to me to be a trade, in which a *British* merchant could not be at liberty to engage; and the terms, in which the Act is framed, seem to me to apply with great propriety to transactions of this nature.

The Cornelis and Maria.

Nov. 10th, 1803.

ture. It is, surely, no reasonable ground of objection, that particular clauses begin by enumerating *ships*, amongst the things specifically subjected to confiscation. There is no inconsistency under the large interpretation which is, according to my apprehension, to be given to the policy of this Act, that where *ships* are sent, they should be pronounced subject to confiscation; at the same time, that where ships are *not* sent, these words should not be understood to convey any limitation to the general prohibition of other traffic. It appears to me, that the employment of *British* capital, in such a rival trade, is that which the policy of the legislature meant to prohibit. With this view those Acts were passed that related to the *Ostend* Company, to discourage the support and maintenance of foreign Oriental Companies by means of *British* capital. Is not this trade of the same nature? Is it not, under the distress of the *Dutch* company, to create a diversion of *British* capital to aid and assist the Company of *Holland?* It would, in my apprehension, be very much in opposition to the policy of the Legislature, as well as against what I conceive to be the literal prohibitions of the Act, if I were to take upon myself to admit such a claim, and thereby to fix, in any degree, an interpretation in favour of such a trade.

Claim rejected.

THE

THE ST. JUAN BAPTISTA AND LA PURISSIMA CONCEPTION.

Nov. 22d, 1803.

Resistance to search, not substantiated, as a criminal act, against neutral ships sailing prior to hostilities, and, at the time of seizure, ignorant of the war.

THESE were cases of *Spanish* ships detained under a charge of resistance to search, but restored with demurrage, and compensation to the crew, for improper treatment received at the hands of the captors.

JUDGMENT.

These cases arise on the capture of two vessels apparently *Spanish*, but alleged to be subject to condemnation, on account of resistance to the exercise of visitation and search, on the part of the belligerent cruizer. The principle of law on this subject is fully established and admitted on all sides. It is, indeed, a principle which has found its way into most of the maritime codes of civilized countries. It has undergone much discussion lately, and the consequence has been to give additional sanction to the principle, and to establish it more firmly in practice.

The only question then turns upon the fact; and among the facts necessary to bring the case within the operation of the law, it must be shewn, in the first instance, that the vessel had reasonable grounds to be satisfied of the existence of a war; otherwise there is no such thing as neutral character, nor any foundation for the several duties, which the law of nations imposes on that character. It is, therefore, a very material circumstance in this case, that, at the time of sailing, no war was supposed to exist, in the knowledge, or contemplation of those who commanded these vessels. They sailed in perfect igno-

The St. Juan Baptista, &c.

Nov. 22d, 1803.

rance of war, and consequently unconscious that they had any neutral duties to perform. It is sworn, likewise, that reports had prevailed of pirates being at sea, which might naturally increase the dread which *Spaniards* usually entertain of *Barbary* cruizers. In this state of alarm a sail was descried, at a considerable distance from land, but not in any place so remote from the scenes that *Barbary* pirates usually haunt, as to carry a necessary conviction that the ship could not be a pirate. The masters had no reason to expect a belligerent cruizer; and their first impression, on seeing a ship of war, might naturally be that it was one of those irregular cruizers, against which their duty to their owners, and to their country, called upon them to use every mode of defence. Whether the privateer was sailing under *English* colours, is a point disputed in evidence; but if she were, it is so ordinary a mode of deception to wear false colours, that little reliance could be placed upon that circumstance; more especially as the war being unknown, no such thing as a *British* privateer could reasonably be expected to appear. The boats approached, and according to the preponderancy of the evidence, I think, without any colours flying. A conversation ensued. All the witnesses depose, and especially a gentleman, to whom I pay particular attention, as a passenger who was employed to act as interpreter on the occasion, "that on being asked what they wanted, they answered to come on board;" to which it was replied from the *Spanish* vessels, "that if they had any thing to say, they might speak." Certainly it was not necessary for the purpose of information, that they should have gone on board.

This

The St. Juan Baptista, &c.

Nov. 22d, 1803.

This conduct might reasonably suggest to the *Spanish* masters very just apprehensions of admitting a number of armed men on board. Another boat came up, and demanded to go between the two ships, which was not permitted, and in my opinion such caution was by no means improper, till the parties were satisfied that the business of these boats was not of a piratical nature. The whole of this proceeding is surely as different as possible, from a case of criminal resistance to a lawful cruizer; since there is no reason to suppose that the vessels knew, either that the assailants were commissioned cruizers, or that they themselves had any neutral duties to discharge. Nothing more passed, than that this request to come on board was refused. There was no refusal of papers, since it does not appear that they were ever demanded. The boats, instead of pursuing their inquiries further, returned to their ship; and, *then*, the *Spanish* vessels, certainly, indicated a disposition to escape. On a supposition that these visitants were *piratical* cruizers, there was nothing else to be done. Even if they were known to be *commissioned cruizers*, I am not aware that a mere attempt to escape, before any possession assumed, has ever been held to draw with it the consequences of condemnation. Considerable stress has been laid on what passed in conversation with the *Spanish* masters. It is said, "that they expressed themselves apprehensive of a war with *Spain*, if *Great Britain* was at war with *France* and *Holland*," and therefore it is inferred that they had determined to escape, and under a conviction that these cruizers were *British* privateers acting under a regular commission of war. I cannot say that

The St. Juan Baptista, &c.

Nov. 22d, 1803.

it appears to me unnatural, that they might suspect the truth of what was told them, of this country being at war with *France* and *Holland*, and not with *Spain*. But what would be the consequence of such an act, not that they were guilty of any violation of neutrality in this attempt? To support that imputation, they must have had reason to suppose *themselves neutrals* and not *enemies*. Therefore in either point of view, whether we suppose them to have acted from the original suspicion of the persons being pirates; or resort to their suspicion of a war with *Spain*, in either case, if the acts of resistance had been much stronger than they appear to have been in the conduct of these parties, they would have been acts of innocent misapprehension only. On this point I am of opinion that the captors have not sustained their charge. —On the question of property there is scarcely room for any suspicion.—The ships are *Spanish* ships, and are so admitted to be, coming from a *Spanish* colony to their mother country. It did indeed occur in the last war, that foreigners were sometimes admitted to trade at the *Havannah*; but I am not aware of any case, in which it appeared that the old established trade from the colony to *Spain* was opened to any but *Spanish* subjects. If there had been such a relaxation, however, it would be but reasonable to suppose, that at the restoration of peace, the trade returned again to its ordinary channel. Every presumption, therefore, is in favour of the supposition, that the cargo belonged entirely to *Spanish* subjects. It might happen, indeed, that other interests were protected under cover of the *Spanish* name, and if any one stood forward to assert such a fact, it would be for the Court

to

The ST. JUAN BAPTISTA, &c.

Nov. 22d, 1803.

to determine on the legal consequences of such a transaction, and to discuss the whole question. But here there is no such averment, nor any suggestion of any other than *Spanish* interests. The masters would not be required to speak with the utmost precision, as to the property of goods laden in time of peace; but these masters *do* speak with full confidence of *their belief*, that it is *Spanish* property, and refer to the *Spanish* register, which, every one knows, is an instrument of considerable solemnity. On the question of property, then, as well as on the other question of resistance, I have no doubt in decreeing restitution. It remains only to consider the charge of improper conduct, which has been made against the captors. In the behaviour and deportment of these vessels, there might, perhaps, have been just cause of seizure, and bringing in for inquiry; but when the facts had been examined, when the property had been proved to be *Spanish*, and a reasonable explanation had been given, of the apparent resistance, they ought to have been immediately restored. There was, I think, ground for enquiry; and if that enquiry had been pursued in a proper manner, and had terminated in proper time, I should have held the captors fully justified in what they had done. But the subsequent proceeding here has been very different: The vessels were brought to *Falmouth* on the 12th of *August;* and the first question to be asked of the captors, and to which the Court is bound to require a satisfactory answer, is, why were no proceedings instituted till the 12th of *September?*—It must be understood by those who arm themselves with the commission of their country, that if they bring

The St. Juan Baptista, &c.

Nov. 22d, 1803.

neutral ships into *British* ports, they must on no account detain them there without enquiry. Grievous would be the injury to neutral trade, and highly disgraceful to the honour of our own country, if captors could bring in ships at their own fancy, and detain them any length of time, without bringing the matter to the cognizance of a Court of Justice. In the present instance this first and fundamental duty has not been performed. For a whole month, the obligation of taking the examination of witnesses, at the first moment, has been disregarded; and all the excuse offered, is some strange misapprehension about the want of a qualification in the commissioners to examine a *Spanish* crew, without a *Spanish* commission; which might have been instantly removed by application to the Actuary. The delay is, therefore, in the first stage, imputable to the captors; and if any inconvenience arises to the neutral merchants, it is no answer to say, that it was owing to a mistake. Persons venturing to take out a commission of war, must instruct themselves in their own duty, and if any inconvenience arises from their neglect, the neutral claimant is not to suffer. When the vessel was brought to *Falmouth*, the Agent went down from *London*, and instead of proceeding as he ought, immediately to the examination of witnesses, he employed himself in taking the affidavits of the captors. I do not say that such a step was absolutely wrong; it might be a proper precaution; but it should have been performed at the same time, that the more important measure of taking the examination was going on. Instead of that, these affidavits are first taken; and then the Agent demands the consent of the *Spanish* Consul for

for the examination of witnesses; a consent entirely unnecessary, and making up a series of mistakes wholly incompatible with the degree of information usually possessed on such subjects. It is said that no inconvenience has arisen from this proceeding, since an application was made to the Court for the hearing of the cause in *October*. I see no reason why it might not have been heard in *September*. But when this application *was* made, it was resisted on the part of the captors; and on the ground that it would be necessary for them to introduce affidavits as to the resistance. Why were these affidavits not taken before? I see nothing in this question on which the affidavits of all concerned might not have been taken at first, as they ought to be, and not have been left to grow up, to meet the exigences of the case, as they arose afterwards. If this had been done, and the matter had been submitted to the opinion of Counsel, the Captor's own Counsel would, in all probability, have advised immediate restitution. At least the cause might have come on, and have been soon determined. Instead of that, I cannot but think that the hearing has been perversely kept off, and I shall allow for two months' detention.—There are besides two other parts of the charge, to which it is necessary for me to advert. The first is the imputation of a practice, which, if proved to have existed in the extent alleged, and without necessity, must be pronounced to be disgraceful to the character of the country; since no one who hears me will deny, that to apply even to enemies modes of restraint, that are unnecessary, and at the same time convey personal indignity and personal suffering, is highly dishonourable. It is

The St. Juan Baptista, &c.

Nov. 22d, 1803.

alleged in this case that the *Spanish* crew, to the number of twenty-two persons, were put in irons. This is a fact which certainly requires much explanation, for I will not say that there may not be cases, in which such restraint may be necessary, and therefore justifiable. But the necessity must be urgent and evident. The captor, when called upon for his explanation, has furnished no apology but what is suggested by his Counsel, that these persons would naturally be regarded, as bent on their original purpose of resistance, and might, in that view, be justly subjected to closer custody. The master acknowledges that he did handcuff some, who were most outrageous, and menaced him and his officers. Admitting the motive to be truly stated, that this act was done for security, I am afraid it will not amount to a justification, because it was incumbent on the captor to pursue a proper purpose by proper means. It should be established to the satisfaction of the Court, that this species of security alone would have been sufficient for his preservation. There might have been a separation of those who shewed symptoms of violence, or there might have been a personal confinement of a slighter kind. Some such measures should have been resorted to, or it should have been shewn that they would have been insufficient. As the case now stands, the party has not made out a sufficient justification. At the same time I must say, that the misconduct appears to have proceeded rather from an improper notion of security, than from any intention to inflict pain or personal indignity. If any such malignant motive had been proved, I should have thought it my duty to pursue this matter much

much farther; but there is no decisive ground for such an imputation. I am of opinion, however, that the party has not justified his conduct, and that it is due to the honour of the Country, and to the injury the *Spaniards* have sustained, that some civil compensation should be made; and with that view I decree 100*l.* to be distributed amongst the sufferers. Embezzlement is also charged; but it is said, on the other side, that some articles were withdrawn, only with a view to protect them from the eagerness of the crew, and that they will be forthcoming. Till I see how far this answer will satisfy the demands of the claimants, it will be impossible for me to pronounce upon this part of the case. I shall refer this matter to the Registrar and merchants, to ascertain the fact and quantity of loss, and I shall reserve my judgment on this question till I receive their report.

Two months detention allowed.

The St. Juan. Baptista, &c.

Nov. 22*d*, 1803.

THE MELOMANE, Colas.

Dec. 8*th*, 1803.

This was a case respecting a prize interest in a capture made by a *boat* hired by the captain of the King's ship the *Dragon*, and sent out, manned with part of the *Dragon*'s crew, for the purpose of impressing mariners that were expected to arrive in the homeward-bound ships. The question was, whether a prize made by such a vessel was to be condemned as a droit of Admiralty, or as prize to the *Dragon*.

Droits of Admiralty.—Capture by a cutter, fitted out by the captain of a man of war, as a tender, and manned from his ship, but without a commission, or authority from the Admiralty, will not enure to the benefit of the King's ship.

On the part of the Admiralty, Laurence.—The Lord High Admiral is to be considered as having the grant of all prizes made without due commission.

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The MELOMANE.

Dec. 8th, 1803.

It is therefore incumbent on all persons setting up a private interest in prize to shew a title and establish their right, under the fair tenor of some commission granted to them from the Admiralty, or it will naturally vest in the Lord High Admiral, now represented by the King in his office of Admiralty. The claim here given is on behalf of the *Dragon*, but the facts of this case are totally adverse to any such pretensions. It is a principle long ago decided, that a commissioned officer does not retain his commission for the purposes of prize on board another ship. This was decided in a case from *Gibraltar*, where a lieutenant on board a non-commissioned ship, at the time when a capture was made, was held to be entitled to no benefit from his commission. In the *American* war the same principle was established in the case of a capture made by the boat of a privateer lying at *Dover*, whilst the vessel was under repair, in which case the prize was condemned as a droit of Admiralty. Indeed very mischievous consequences must inevitably ensue, if the officers of ships of war could suppose themselves at liberty to dissipate their force, by distributing it into small boats, for the purpose of multiplying their chances of prize: Without pursuing this objection, however, it is sufficient to observe, in point of law, that the *onus* of proving their title lies upon the *Dragon*, as she was not in sight; that the necessary proof is in no degree supplied, and therefore that the vessel and cargo must be condemned as droits of Admiralty.

On the part of the Dragon, the King's Advocate and Robinson.—There are six other cases depending on circumstances similar to those on which the present

claim is founded, except that in those other cases, the capture was made solely and entirely by the hired cutters, without any intervention of the boat of the King's ship, by which the cutter was sent out. As a general argument comprehending the whole of these cases, it is submitted that the prize will enure to the benefit of the *Dragon*, not in consequence of any commission impressed on the cutter, but by her connection with the *Dragon*, as representing the actual force of the *Dragon*, being armed from that vessel, and manned by the crew borne on the books of the *Dragon*. It is not unusual for ships of war to be so attended by tenders, whose acts are considered as being as much the acts of the principal ship, as if they were performed by her own boat. In the *West Indies* especially this practice has long prevailed, with the effect now contended for. Boats are sent out to cruize, and captures taken on such cruizes are considered to belong equally to the whole ship. In some cases that have come before the Court the same effect has been ascribed to capture by boats. In the *Chinsurah* case, the capture was made by a small boat sent up the river. In the *Odin* the capture was made by a boat of the *Trusty*, sent to a considerable distance, and entirely out of sight of the *Trusty*; there the Court expressly recognized the principle, that a capture made by a boat would enure to the benefit of the whole ship, because the officer of a King's ship was at liberty to take by more or fewer of his force. So in the *Rebecca*, *Thompson*, a capture made at land by the detached part of the crew of a ship of war, was condemned to the ship, the Court saying "that the capturing force under the circumstances, might be considered as a stationary tender, attached to

Adm. Reports. Vol. 4, P. 362.

Adm. Reports. Vol. 1, P. 227.

The MELOMANE. Dec. 8th, 1808.

to the ship." These instances will serve to prove, that there is nothing novel in the principle, that a prize made by a part of the crew of a King's ship, detached from the main crew, may enure to the benefit of the ship, and be condemned to them, as prize made by captors acting sufficiently under the authority of their general commission. The case which has been cited from the *American* war was of a different nature, being the case of a privateer, in which the terms of the commission are limited and confined to *the person* of the commander, who was not on board, and to the operations of the identical ship. As to the particular object of the parties, and the consequences likely to result from such a practice, no objection can fairly be raised against the claim, on either of these grounds. The general purpose of this cruize was undoubtedly to obtain a supply of men, but still the intention of capturing was not wanting, as it is expressed by the authority taken from the Port-Admiral, *to make captures of French and Dutch ships.* The *animus capiendi*, therefore, was not wanting, though it cannot be supposed to have operated in such a manner, as to have occasioned any improper employment or disposition of the ship's crew. The tender was directed to cruize in a certain direction, with a view of falling in with the *Dragon*, when she sailed from port. If it had not been that a particular state of foggy weather came on at that time, the actual capture is represented to have been made in such a place as would have been, if not in sight, at least very near the vessel, and in the exact track in which she was sailing. In the particular case of the *Dragon*, however, the right does not depend upon this general argument; since the capture in this case was

The MELOMANE. Dec. 8th, 1803.

was actually made by the crew of the *Dragon*, in the boat of the *Dragon*. How they came there, whether by the assistance of another vessel, or with more or less degree of enterprize, is of no importance. It is sufficient that they presented themselves as the persons taking the property out of the hands of the enemy, and taking it, according to their intention, for the benefit of the *Dragon;* — being sufficiently authorised by the words of the Prize-Act, which give the interest in prize to the captors thereof, "being in his Majesty's service and duly commissioned."

In Reply, Laurence — The words of the Prize-Act in its enacting clause, expressly limit the grant "*to persons on board of our ships of war.*" The other words are merely descriptive of the intention of his Majesty, and not accurately reciting the words of the Proclamation. As to the character of the boat itself it is impossible to consider her as the actual captor, inasmuch as the effectual surrender had been made *before* to the *Assistance* cutter; the boat being only put out to secure possession, in the same manner as the boat of the cutter might have been used. In such a situation, the boat cannot be considered as acting in an independent character, or as retaining her dependence on the *Dragon*, but as being attached to the principal *force* of the *Assistance*, to which the surrender was made. The practice that has been mentioned as taking place in the *West Indies*, can form no precedent, as it depends on the particular situation of ships in that part of the world. It has, moreover, never been brought before the Court in any manner so as to be sanctioned as a judicial precedent.

The Melomane. Dec. 6th, 1803.

cedent. In the case of the *Odin*, the boat which made the capture went out in her own distinct character, as the boat of the *Trusty*, not superseded or affected by any subsequent connection with any other ship. She went out *besides* for the sole purpose of making the capture of that particular vessel, of which intelligence had been received, and in a part of the world, where, owing to the variable state of the winds, it was particularly expedient to make attempts of that kind by means of boats, in preference to large ships.

JUDGMENT.

Sir *W. Scott.*—This case comes on upon the claim of Captain *Aylmer*, who is unquestionably a very meritorious officer, and as it appears by his affidavit, commands a very meritorious crew. (*a*) If considerations of this kind could supply a principle of judgment, the case might easily be decided; but that gentleman, as well as every one else, must know, that the Court can only look to legal principles, as the foundations of a legal decision; and that whatever the personal merits of the parties may be, they cannot in any degree influence the judgment of the Court, but must be left to seek their remuneration elsewhere. It is made a question in the act of Court, and in argument, whether the capture was effected by the *Assistance* cutter, or by

(*a*) Captain *Aylmer* had stated in his affidavit his long services abroad, and the zeal and attachment of his crew in refusing the bounty-money for the present war, provided that they were permitted to be continued under his command.

the

The MELOMANE. Dec. 8th, 1808.

the *boat* of the *Dragon*, accompanied by the cutter. All the depositions represent the capture to have been made by the *Assistance* cutter, acting, as the *French* witnesses describe her, *as a tender to the Dragon*, though this is a fact which could not be a subject of observation at the time, and could be known to them only by the report of the boat's crew afterwards. The effect of this evidence only serves to shew that the *Assistance* cutter was the *actual captor*. It is contended in argument, however, that the boat of the *Dragon* was sent out to take possession, and that such an act of seizure by the boat's crew of the *Dragon*, will entitle the ship herself to the whole benefit of the prize. The Court would certainly be disposed to extend, as far as it could with propriety, to ships of war, the benefit of captures made by their boats, acting distinctly in that capacity. There must be situations in which the capture could not be made otherwise; and many considerations of convenience require, that they should be allowed to take in whatever manner their judgment may deem most expedient, according to the circumstances of the case, either by their whole force, or by a part detached on that particular service. The Court would therefore not be disposed to narrow the legal effect of the operations of their *boat's* crew. But in this particular case it remains to be considered, in the first place, whether the boat was acting as the boat of the *Dragon* or not. The tenor of all the evidence inclines me to think that she *was not*; that she had been *detached* from the *Dragon*, and *attached* to the *Assistance* cutter, and that she was employed in performing the same services for the cutter, as she would have performed for her own ship. If that is to be taken

The MELOMANE. Dec. 8th, 1813.

taken as a correct view of her situation, I cannot but accede to what has been said in argument, that a boat so detached *from one*, and *attached to another* vessel, must be taken as acting under the authority, and for the benefit of the ship to which, *at that time*, and in those operations, she *more properly belongs*. The fact appears to me to be, as it is described by the witnesses of the captured ship, "that the capture was actually and effectually made by the *Assistance* cutter, and that the boat was only used to perform such acts, as would in the ordinary course of service have been performed by the cutter's own boat."

Taking the fact to be, that the capture was made by the *Assistance* cutter, the Court has only to decide, how far the act of the *Assistance* can enure to the benefit of the *Dragon*, on which she is represented as attendant. It is an elementary principle of prize law, that all prize belongs to the state—in monarchies to the Sovereign. By modern policy this interest has been granted out to persons of certain descriptions, acting under the authority of public commissions. A very ancient grant has given to the Lord High Admiral, the benefit of all prize, taken by *persons not commissioned;* and it lies on the individual captor in every case, to shew the authority by which he is entitled to take for his own benefit. The title-deeds, on which only claims of this kind can be constructed, are the Prize Act and the Proclamation. The Proclamation confers the interest in prize "on our ships of war, and those which have taken out letters of marque." The Prize Act is much to the same effect, adding only in the last Act, "mariners, &c. on board our hired armed ships."

These

The MELOMANE.

Dec. 8th, 1803.

These descriptions of vessels are, with those acting under letter of marque, the only parties that can maintain a legal interest in prize. What are the circumstances of this case? Captain *Aylmer*'s affidavit states that the cutter was hired at his expence, and stored and manned from the King's ship the *Dragon*." That commanding officers of his Majesty's ships may have a right to put their men, arms, and stores on board another vessel, I shall not question in the present case. There may be circumstances that may render it fit, in many instances, that such a discretion should be exercised, subject to the responsibility that always attends them in the discharge of their public duty. But the question which I have to consider is, whether, by so doing, an officer can be said to put that other vessel into commission, and entitle it to the privilege of being reckoned amongst the description of vessels, to which the interest in prize is given by the Proclamation and the Prize Act. Indeed I may observe, that the very claim that is set up for the *Dragon* contradicts the suggestion; because if this cutter, so employed, could be considered as *commissioned* to take for herself, she would become a constituent part of the navy, and the *Dragon* could have no interest to maintain. If then the cutter is not a commissioned vessel, the question must be, whether, not being entitled to take for herself, she does, from being so fitted out, become a boat, or, in a legal point of view, a constituent part of the *Dragon*'s force? What I have said of boats may in some degree apply to tenders. If a capture is made by a tender attached by the interposition of public authority; on every principle on which a

The MELOMANE. Dec. 8th. 1803.

capture by a boat would entitle its ship, a capture made by a tender, specially employed in that capture by the ship of war to which she belonged, might, perhaps, entitle that ship. But this is not a tender attached by any interposition of public authority, but by the private act of the officer hiring and manning her himself. Is a cutter so set forth recognised by the Admiralty in any capacity? Is she borne on the books, or considered as a part of the navy of *England?* I apprehend not; she is taken up by the gentleman himself, acting from his own discretion, for good purposes no doubt, but *not in a manner* that can give such a vessel any connection or incorporation with the navy of *Great Britain.* Surely it is not to be maintained that an officer, by putting his men on board, *can* constitute a ship to be a part of the navy of *Great Britain.* Such a character is not, in my opinion, to be impressed without the intervention of some public authority. If the contrary could be held, this must follow, that an officer of a large ship might form out of these tenders as many ships of war as he pleased. He might compose a fleet. It is said that a similar practice has been not unfrequent in the *West Indies.* But every body knows, that in remote situations, the principal persons in command must necessarily be entrusted with a greater latitude of discretion. In such a situation, they must act as well as they can from their own judgment, not having an opportunity of referring immediately to the Board of Admiralty for instructions and authority, suited to the various circumstances that may occur. They grant commissions, it is to be observed, for the same reason, and if these commissions are afterwards confirmed by the Admiralty,

ralty, they rank from the original date. If a case of this description was to come before the Court from any such remote station, the Court would have to consider how far the particular circumstances would bear it out in point of validity. At home the case is very different: When an officer has it in his power to refer instantly to the Admiralty, the same effect will not follow; nor is it to be ascribed even to the acts of an Admiral; for it appears to me that an Admiral on the home station, would have no more power than a captain of a single ship, to constitute a tender to be part of the public navy; though all that is done by the Admiral, in this case, is simply to give them leave to go out. A good deal has been said upon the consequences and general convenience of such a practice. It is impossible to attend much to such considerations. If I am to entertain them at all, I confess it appears to me that the *inconvenience* of such measures would very much preponderate. More captures, it is true, might be made, but what would be the general effect? If every merchant ship might sally out and take under the authority of ships of war, the number of captures might be greatly increased: but such a consequence, however lucrative to individuals, never could be admitted as a sufficient justification of such a principle in point of political expedience. It is of much more important expedience that it should be left to the State alone to judge, both of the extent and of the mode of hostility that is to be exercised. That is a principle which must never be lost sight of. Looking at this case, therefore, in every point of view, both on principle and expediency, I have a clear and decided opinion, on which I feel no hesi-

The MELOMANE. Dec. 8th, 1803.

tation to pronounce, that this capture was not made by persons legally commissioned to take for their own benefit, and consequently, that the petition of Captain *Aylmer* must be rejected.

Dec. 8th, 1803.

THE NOSSA SENHORA DA ADJUDA, ARAUJO.

Treaty with *Portugal*, 1654. *Free-ships, free-goods.* — Quære, how far this privilege can be extended to the carrying of enemy's property out of a blockaded port. — Restitution on the facts of the case, they being not thought sufficient to bring the question of law fairly before the Court.

THIS was a case of a *Portuguese* ship, captured on a voyage from the port of *Rouen* to *Lisbon*, and proceeded against for a violation of the blockade of *Havre*. — It appeared that the vessel had gone in to *Havre* before the blockade (*a*) commenced, and had been taking in her lading from the 1st to the 29th of *September*. — She sailed from *Rouen* to *Havre* on the 1st of *October*, and proceeded on her voyage on the 19th, when she was captured by the ships cruizing off that port. The master, in his depositions, denied that he had received any information of the blockade before he left *Rouen*. — A claim was given for the ship as the property of merchants in *Portugal*; and for the cargo as privileged by the treaty of 1654, which established the exemption of free ships, free goods, between the two countries.

On the part of the Captors, the King's Advocate and Robinson contended — That the privilege of the treaty could not be extended to a case like the present; which included not only the carriage of *enemy*'s goods, but also the exportation of the

(*a*) Blockade of *Havre*, *Sept.* 6.

goods

goods of the enemy from a blockaded port.—As to neutral owners, it might be reasonable, that shipments on their account should be free from the penalty of breaking the blockade, till they themselves should be affected with a knowledge of the blockade, either *de facto*, or by construction of law; but with regard to enemy's goods, the blockade must be taken as operative from the moment of the notification, or from the time when it is actually imposed.

The Nossa Senhora da Adjuda.

Dec. 8th, 1803.

JUDGMENT.

Sir *W. Scott.*—In this case the claim is given for the ship, and for some parts of the goods specifically, as belonging to the master; and for the rest of the cargo as being on board a free ship. On these latter goods it is assumed, that they are the property of the enemy; and then it is argued, that the protection of the treaty cannot be extended to the case of ships carrying the goods of the enemy *out of a blockaded port*. If the cargo had appeared to be actually the property of the enemy, it might have become necessary to decide that point of law, whether the privilege of *free ship, free goods*, can be construed to extend to the case of exporting enemies goods *from a blockaded port*, even before the ship herself is affected with a knowledge of the blockade. If such a case had fairly arisen, I should have taken some time to deliberate upon it. But I perceive the cargo, though claimed *generally*, is documented in the bills of lading as the property of merchants of *Portugal*, notwithstanding the master does not verify that fact in his depositions. Indeed, from the observations that we have frequent opportunities of making, it appears, I think, to be

The Nossa Senhora da Adjuda.

Dec. 8th, 1808.

very much the practice of *Portuguese* merchants, to import *on their own account.* Since the utmost that I could do, in this stage of the cause, would be to order farther proof of the property; I am not disposed to do that, in a case like the present, for the purpose of raising the question of law. The whole cargo is described as *Portuguese* property in the papers, and as such I shall decree it to be restored.

THE CARLOTTA, Pasqual.

Dec. 13th, 1803.

Salvage on neutral property, re-taken out of the hands of the enemy, *not* given, — unless it can be shewn by reference to the ordinances, or to the practice of the Prize Courts of the enemy, that the first seizure was made under such circumstances as would have exposed the goods to condemnation in the hands of the enemy.

This was a question of salvage, on the re-capture of a *Spanish* ship and cargo from a *French* cruizer. It appeared that the vessel was originally destined on a voyage from *Montevideo* to *London*, with some property on board belonging to *British* merchants; that in the course of this voyage, she had been seized by a *British* cruizer, who was bringing her to the port of *London*, when she was met and captured by a *French* privateer, and was afterwards re-captured, and brought to *Jersey*.

On the part of the Spanish Claimants it was contended — That neutral property was not, according to the ancient prize law of this country, subject to salvage; that the general principle was recognized, after deliberate search and inquiry into precedents, in the case of the *Jonge Lambert.* (*a*) That the special consi-

Lords, 1745.

(*a*) As the *Jonge Lambert* is a case frequently cited on the question of salvage, it may not be improper to state the particular circumstances of it, from the books of Registry, and from a note of

considerations on which the alteration of practice took place last war, did not apply; and that there was

The CARLOTTA. Dec. 13th, 1803.

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of the case, with all its papers, in the possession of the Editor. It was a case of a *Dutch* ship, and a cargo of cotton, drugs, &c. taken on a voyage from *Smyrna* to *Amsterdam*, by a *French* privateer, and re-captured, after three days' possession, by the *English* privateer the *Salamander*, 6th *October*, 1744. A claim was given for *Dutch* merchants, but the Judge of the Court of Admiralty thought it immaterial to go into proof of property, holding the cargo subject to condemnation, as property taken from the enemy, and pronounced sentence of condemnation 16th *November*, 1744. This appears from the draft of the claimant's case of appeal, in which it is stated, "That the Court would not give time for that purpose, but went on the previous point, that as it was in possession of the *French*, it was just cause to condemn the ship and cargo. On appeal, the sentence was immediately *reversed*, the claim was admitted, and the parties were directed to go into proof, by the examinations, and other usual evidence. On the 25th *May*, 1745, the Lords of Appeal decreed restitution of the property, but declined to enter into the consideration of the question of Salvage, and referred it to their Surrogates, Dr. *Betteswortb*, Dr. *Lee*, and Dr. *Edmonds*, by consent of parties, to determine "*whether any, and what salvage is due*," on or before the first day of *Michaelmas* Term, next, with provisions for the execution of their decree.

On the 8th *July*, the Surrogates met, and took upon them the reference, and directed the Proctor to exchange precedents, and leave copies in the Registry ten days before the 7th of *Auguſt*. On the 7th *August*, they met again, and directed the Registrar to look up the precedents delivered, by *Farrer*, Proctor for the captors, and appointed the 7th *October* for the next Sitting, and directed the Proctors to attend.—On the 2d *October*, 1745, the Surrogates met, and having fully considered the whole matter, pronounced and declared *that no salvage is by law due on this behalf*, but that there was just cause of seizure, and that the parties appellant ought to be condemned in the expences due by law."

On this statement it is not perfectly clear, what was the extent of their decision; whether it was meant to establish, that *no sal-*

The CARLOTTA.

Dec. 13th, 1803.

was no ground on which the property of the *Spanish* merchant could be deemed subject to salvage.

JUDG-

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vage is due on the re-capture of neutral property out of the hands of the enemy *generally*, or whether their decision was confined to that *particular case*, as *the case* of *Dutch* claimants standing on special grounds. The prayer of the claimants was restricted to the strong grounds of their particular case. "The claimants humbly apprehend, that they are well warranted to conclude, that the salvage insisted on by the captors, is contrary to justice, and to the rule, practice, and usage established between *England* and *Holland* in similar cases, and that the decreeing salvage would be acting contrary to the public faith and promise of the Crown, pledged to the *Dutch* in the most solemn manner before-mentioned, and be inconsistent with that probity and good faith, for which this nation has in all ages so deservedly distinguished itself. — And therefore the claimants humbly hope their Lordships' said Surrogates will be of opinion, "That no salvage ought to be paid in the present case." The claimant's case, however, contained two points — one on principle; and, secondly, this particular one standing on the peculiar relations of the two countries. On which of these grounds the Surrogates decided, is not expressly stated. The reference under the words of the Lords' decree, is not necessarily of a general nature; nor does the report of the Surrogates go beyond the particular case in all its circumstances.

Amongst those particular circumstances must be reckoned the reference which was made to the practice of the States of *Holland*, exemplified in two instances. In the case of the *Handmaid*, 1664, an *English* ship retaken from the *Algerines*; and in the case of the *Thomas* and *John*, 1676, an *English* ship retaken from the *French*. The *Handmaid* was restored, after some deliberation, and without reference to principle or precedent, but with an expressed reliance "that *Dutch* merchants, in similar cases, would receive the like treatment from *England*;" and in the case of the *Thomas* and *John*, the matter was reserved, for an opportunity of applying to the Privy Council of *England* to obtain an assurance, that a like practice would be observed towards *Dutch* ships. This promise was given and communicated by Sir *W. Temple*, the *English* Ambassador at the *Hague*, and

Handmaid, 1664.

Thomas and John, 1676.

JUDGMENT,

The CARLOTTA.

Dec. 13th, 1808.

Sir *W. Scott.*—The question now to be decided is, whether salvage is due on the neutral property in this

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and the restitution of the *Thomas* and *John*, without salvage, took place in consequence of that negociation.

On the part of the captors, five precedents were adduced. — 1st. The *Flying Dragon*, belonging to an *African* Company of *Embden*, 1697, recaptured from the *French* by an *English* man of war, and restored on salvage. — [Answered — That *Embden* was garrisoned as a *Dutch* place, and that *Holland* was at war with *France.*] 2d. The *St. John*, 1703, a *Danish* ship, with a *Hamburgh* cargo, retaken from the *French*, and restored on salvage. — [Answered — That *Denmark* was involved in war with *France* as an ally of *England*, by declaration of *France* 3d *July* 1702, against *England* and her *allies*. As to *Hamburgh*, that that city was a part of the *German* empire, and that the Emperor and the *Empire* declared war against *France* 28th *September* 1702.] 3d. The *St. Catharine*, taken 10th *October* 1703, restored to subjects of *Portugal* and *Hamburgh*. — [Answered — That both were at war with *France.*] 4th. The *Old John Baptist*, *August* 1703. [Answered as above — a *Hamburgh* case.] 5th. The *Wrestling Jacob*, a *Swedish* ship, restored 1696. — [Answered — That *Sweden* was engaged to furnish troops to *England* in her war with *France*, which began 1688, and did not end till 1697. That if *Sweden* was not actually at war with *France*, as might be suggested from *Sweden* being accepted as a *mediator*, there were reciprocal jealousies subsisting between the two Countries; that there had been a seizure of *Swedish* ships in *French* ports, and of *French* ships in the ports of *Sweden*. — It was contended therefore — That all the cases of the captors were cases of property exposed to danger in the Prize Court of *France*, and were, as such, inapplicable to a case of neutral property, which was not subject to the danger of condemnation in the Prize Court, of the first taker.

On this general objection to the effect of these five precedents, it may be observed, that on the first draft of the claimant's case, the same cases are referred to under the title of "Copies of some Cases of Ships *restored* to *Neutral Nations*," as authorities against the sentence of *condemnation* that had passed in the Court below. — It appears that there were brought forward, in the course of the pro-

The CARLOTTA.

Dec. 13th, 1803.

this ship, which has been recaptured out of the possession of the enemy. It certainly has not been the practice of this Court to decree salvage under such circumstances generally; but, in consequence of the violent conduct of *France* during the last war, it was thought not unreasonable, on the part of neutral merchants themselves, that salvage should be allowed. The conduct of the *French* nation, in the course of their warfare on land, during the present war, has unquestionably been as rapacious, and as little restrained by any regard to the rights of neutral nations, as it could possibly have been during any part of the last war. What the proceedings of the maritime Courts of that Country have been during the present war, I am not correctly informed; from the little which I have been able to collect, I am rather induced to believe, that they have been conducted with more regularity, and with a disposition more inclined to return to the established principles of justice, on which the prize system of ancient *France*, in common with that of the other maritime countries of *Europe*, was built. I am therefore not disposed to hold generally, that neutral property recaptured from *French* cruizers shall be subject to salvage. The rule, so far as it can be considered a general rule, is rather to be laid down the other way. At the same time, if any edict can be appealed to, or any fact established, by which it can be shewn that the property would have been exposed to con-

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proceedings, some precedents of condemnation of neutral property taken out of the hands of the enemy. — But on the other side they are said to have been either cases of contraband against the enemy — or of false papers — or of resistance to the enemy. — The *Queen of Heaven*, and other cases.

demnation

demnation in the Courts of *France*, I shall hold that to be sufficient ground to induce me to pronounce for salvage in that particular case. With regard to the precedent of the *Jonge Lambert*, I think I am warranted to consider the authority of that case as in great measure done away by the subsequent decision of the Lords in the late war, in which they have repeatedly pronounced for salvage on the recapture of neutral property. In departing from the old rule, they have in some degree disclaimed the principle; and, I think, with great propriety, as far as it could be considered as an universal principle, governing the practice of our Prize Courts in all possible cases, without any possible exception. In the present instance, there does not appear to me, to be any grounds on which it can be supposed that this property would have beeen condemned, merely because it came out of the hands of a *British* privateer, or because the original voyage had been from the colony of *Spain* to *London*. No edict has been produced from the *French* code, to shew that this property would have been subject to any such penalty, on either of those accounts, in the Prize Courts of *France*. The expences of the recaptors must be fully paid; but I shall not pronounce salvage to be due.

The CARLOTTA. Dec. 13th, 1803.

THE DIANA, RUNKE.

Dec. 19th, 1803.

THIS was a leading case on the claims of several persons who had settled in the *Dutch* colonies, in the course of the late war, during the time they were in

Claims of persons settling in the *Dutch* colonies, whilst in *British* possession, and resident there at the breaking out of the war, for property seized before hostilities. The *onus probandi* as to *an intention of removing*, *relieved* by the particular circumstances of the colonies having been in *British* possession, till after the termination of the last war, *taken in conjunction* with the presumption raised by the stipulation of the treaty of *Amiens*, that persons so settled, *would remove*, on the restitution of the colonies to *Holland*.

The DIANA.

Dec. 19th, 1803.

in *British* possession, for property taken before hostilities, on a voyage from the *Dutch* colonies to *Holland*.

JUDGMENT.

Sir *W. Scott*. — This question concerns the manner in which the goods of two classes of persons connected with *Demarara* are to be considered. The two descriptions of persons are, those who had settled in *Demarara* during the time the island was in *British* possession, and those who had settled there before that event. It was first contended on the part of those settling there, whilst the island was under *British* protection, that their settlement had been very recent. That alone would not be sufficient. Mere recency of establishment would not avail, if the intention of making a permanent residence there was fully fixed upon the party. The case of Mr. *Whitehill* fully established this point. He had arrived at *St. Eustatius*, only a day or two before Admiral *Rodney* and the *British* forces made their appearance; but it was proved, that he had gone to establish himself there, and his property was condemned; mere *recency*, therefore would not be sufficient. But it is said that this was not merely an establishment *recently* formed, but one formed also whilst the island was under the protection of the *British* Government. This indeed may afford a very material addition to the circumstance of mere recent establishment. What the effect might be, it may be unnecessary for me to inquire, till it shall appear whether there was any compact between the countries, which in any manner determines what the character of persons in that situation should be; because if there is any such agreement, it will be needless for me

me to make an excursion into general principles, when the point in question will at last be governed by the particular stipulations of the compact. The Treaty of *Amiens* contains an article, which, it is said, does point to the character of such persons. The 13th article stipulates, that, in cases of cession, "*there shall be allowed to the inhabitants, of whatever condition or nation they be, a term of three years, to be computed from the notification of this present Treaty, for the purpose of disposing of their property acquired and possessed either before or during the war, in which term of three years they may have the free exercise of their religion and enjoyment of their property. The same privilege is granted, in the countries restored, to all those, whether inhabitants or others, who shall have made therein any establishment whatever, during the time when those countries were in the possession of Great Britain.*" Certainly the intent of this article must be considered as a stipulation, between the two Countries, for *this purpose principally*, that the country to which the cession is made, should not molest the inhabitants so restored, but that a space of three years, from the notification of the Treaty, should be allowed for the unmolested removal of themselves and their property. Primarily, therefore, it is not intended as a contract with those individuals that, under all circumstances that may happen between the two Countries, they shall be held *British* subjects by the Crown of *Great Britain*. At the same time, I cannot but think that it affords a principle highly material and favourable to the claimants, in the presumption which it holds out, that those who went there during the time of *British* possession, had done

The DIANA.

Dec. 19th, 1808.

so *on account of British possession*, and might be supposed to be desirous of quitting those establishments, when the island ceased to be under the protection and government of this country. It goes, therefore, to the point on which a great deal of the discussion turns, the *onus probandi* on this question—whether or not it lies on the claimants to shew, that they had taken measures to withdraw, and had actually engaged in the operation of removing. The Treaty shews it to have been the expectation of the contracting parties, that they would remove.—A presumption is therefore founded in their favour, not only on the general nature of the facts, but also on the declared opinion of the Countries that were parties to this Treaty. In this state of things, it is *not*, I think, necessary for the claimants to produce that evidence which has been demanded, to shew that they had taken any steps towards removal; because the presumption is to be taken as already in their favour, unless it is ousted by the production of any contrary evidence on the other side. It is contended that there is something to that effect in the time which had already elapsed; and that the inaction of the parties, during that period, affords a counter-presumption that they were not in the act of removing, and that they did not intend to remove. In support of this argument, it is said, that the parties might be expected *to determine* at an early period, and that the three years were allowed only for carrying the removal into effect. It is argued, that the determination should have been made at an *early period*, though no specific time has been assigned, In answer to these observations, it is, I think, to be con-

The DIANA.

Dec. 19th, 1803.

conceded that the determination could not be expected to be *instanter*. Some reasonable time for deliberation must be allowed. The time given by the Treaty is *three years*, and not from the date, but from the notification of the Treaty. If it could be maintained, that persons were obliged to come to their determination in the first or second year, there would be still the third year for their actual removal; and there are two or three circumstances of a public nature, that may, in fair consideration, be supposed to have enlarged to these persons the term of the Treaty. In the first place, it is to be observed, that of the three years a very small portion had elapsed before the war broke out; indeed the term is not yet expired. Secondly, the cession of the colonies was not made immediately after the Treaty; it was a matter which hung for a considerable time in suspence. Owing to a want of ships and troops, or from other causes, the *Dutch* did not take possession for many months, and the island remained *de facto* in the possession of this Country. During this period their term for deliberation was necessarily protracted. It must not be withdrawn from our recollection also, that during the short interval that Peace half smiled upon us, circumstances of irritation were continually occurring, which might fairly induce persons in that part of the world to speculate upon the chance of those settlements falling again under the dominion of *Great Britain*. Under such considerations we may suppose that their removal would be retarded; the hope that *Great Britain* would return to its sovereignty over this settlement might naturally suspend the resolution to remove. Within a very

The DIANA.

Dec. 19th, 1808.

a very short time after the notification, the events that might have been expected, actually took place. Hostilities recommenced, and on the first application these persons surrendered again to the *British* arms, and became not only in their property, but *territorially*, as much the subjects of this country as the inhabitants of any part of it. When I bring these topics together, I do not mean to make a collection of events which have no material connection with each other, or to form an aggregate of unsocial materials, the effect of which singly taken would not be sufficient to support the conclusion that is drawn from them. That I know, is a very unsound and fallacious mode of reasoning; but I collect circumstances of a concurrent bearing, and of a congenial quality, all of which taken separately are entitled to great consideration, and conjointly contribute to increase the force of each other. With respect therefore to those who settled there, during *British* possession, I am of opinion that the presumption of an intention to remove was established in their favour; that, under the appearances which the known circumstances of the world held out, they had a right to spend some time in deliberation, and that that term could not be held to be expired when hostilities again broke out. The goods in question were shipped in a time of Peace, and under the faith of a Treaty; and at the time when this Court is called upon to decide on the claim, the proprietors are again restored to their *British* character, and are *redintegrated* subjects of this country. Under all these circumstances I should betray a very obtuse sense of what is absurd and unjust, if I did not

The DIANA.

Dec. 19th, 1803.

not feel it highly reasonable that they should be admitted to their Jus Postliminii, and be held entitled to the protection of *British* subjects. The cases which have been cited do not, I think, substantially apply to the present case. Mr. *Whitehill* went not to an *English* settlement, but to a place which had, as it has been observed in argument, rendered itself particularly obnoxious by its conduct in that war. On the authority of Mr. *Curtisos* case, it is contended, that some act of removal was necessary to be *shewn;* but that Gentleman had settled not in a *British* colony, but in a foreign country, which made him justly liable to be called upon to shew by some overt act, that he had begun to remove. The claimants on the contrary had established themselves, as I have before said, in a *British* settlement, under a presumption publicly recognized, that they would remove when the connection with the *British* Government ceased. Their time for deliberation was still unexpired, and on their claim I pronounce without hesitation that they are entitled to restitution. As to other persons who had formed their establishment before the period of *British* possession, I cannot see on what principle the same intention can be sustained. As they had settled without any faith in *British* possession, it cannot be supposed that they would have relinquished their residence because that possession had ceased. They had passed from one sovereignty to another with indifference; and if they may be supposed to have looked again to a connection with this country, they must have viewed it as a circumstance that was in no degree likely to affect their intention of continuing there. They are, therefore,

The DIANA.

Dec. 19th, 1803.

entirely out of the principle which I have laid down in deciding on the other claims; and unless I could go to the length of considering, that because the Treaty had not been executed in some parts, the whole was therefore null, and this settlement *de jure* never out of the possession of *Great Britain*, as it has indeed been contended in argument, I see no ground on which their claim to restitution can be sustained. It is impossible for me to entertain any such construction. The Treaty consists of several articles, of which some were to be carried into immediate execution, whilst others were merely executory. But so far as the Treaty *was* carried into execution, so far I must consider Peace as actually subsisting between the two countries, notwithstanding war may have broken out again, on some of those other articles which were in their nature executory, and were originally subject to some delay. The Peace must be held to have been perfectly re-established in all legal effect, and I have heard of no case in which this matter has been otherwise considered in other Courts of Justice. On the situation of persons settled there previous to the time of *British* possession, I feel myself obliged to pronounce, that they must be considered in the same light as persons resident in *Amsterdam*. It must be understood, however, that if there were among these any who have been actually removing, and that fact is properly ascertained, their goods may be capable of restitution. All that I mean to express is, that there must be evidence of intention to remove, on the part of those who settled prior to *British* possession, the presumption not being in their favor. What I have said of *British* subjects

jects settling during the time of *British* possession, must be taken also as applying equally to the claims of all persons of other countries going thither, and forming their establishment there during that period.

The DIANA.

Dec. 19th, 1803.

IN THE SAME CASE.

Dec. 19th, 1803.

A QUESTION arose, respecting the liability of goods restored to *British* merchants, in *Dutch* ships captured on a voyage from the colonies of *Holland* to *Amsterdam*, and condemned to pay freight to the captors.

Freight allowed to captors carrying the goods *not to* the actual port of *destination*, but to the claimant's own *country*, and to the ports to which they would have consigned them if not prevented by the regulations of Holland. See the particular circumstances.

On the part of the Captors, the King's Advocate, Arnold, and Robinson. — By the general rules of the Prize-Courts, captors have no claim on the cargo for freight, unless it is carried by them to the place of its original destination; *and for this reason*, that the goods cannot be supposed to have derived any benefit from the capture, but are still left in the owner's hands, to be sent on by a new shipment to the place of their destination. A distinction may, however, be taken, in respect to the nature of the destination. The original rule was undoubtedly framed with a view to *European* commerce, in which the profit of the whole adventure may depend upon the particular order given for the goods, and on their arrival *at the particular place;* whilst from the similarity of *European* productions, they might be of little value, even at a small distance from the particular market for which they were designed. With respect to colonial productions the case is very different; they

The DIANA.

Dec. 19th, 1803.

may be said to have a double distinction. First, To the *European* market *generally*, by which their principal value is constituted; and, secondly, To the particular market to which they were consigned. The first increase of value has accrued on these goods, by their safe arrival at the *European* market generally. But a more special advantage has been derived to these claimants, from having actually received their property in their own country, instead of suffering the risk of confiscation, if the goods had gone in their original course to the ports of the enemy. It is besides to be remembered, that in the special application which was made on behalf of *British* merchants, *that they might be allowed to claim* goods so entirely incorporated into the colonial trade of the enemy, the destination to *Holland* was represented as a circuitous and compulsive destination, to which they submitted, only, because they had no means of bringing their goods home from the *Dutch* colonies, in any other than *Dutch* ships. By their arrival in this country, they have therefore obtained a delivery at their own home, in the ports for which their goods were virtually designed. These cases stand on special grounds therefore, and may justly entitle the captors to freight, without breaking in upon the rule, which is laid down for cases under ordinary circumstances.

On the other side, Laurence and Swaby. — If the principle of the general rule is considered, it will appear, that there is no distinction in the circumstances of these cases, that can fairly be applied to defeat the application of it. The principle is, that when

The DIANA.

Dec. 19th, 1803.

when the *Original* contract has been fulfilled, the payment of freight is due, and not otherwise. It is not upon an ideal estimate of benefit, or disadvantage, that this principle of law is founded; but on the precise consideration of the original contract, whether it has been performed or not. The distinction which has been attempted, with regard to colonial productions, is totally untenable, inasmuch as the rule has been applied to destinations from the *East Indies*, as well as from ports in *Europe*. The case of the *Etrusco* was a case of this nature: Mr. *Constant* came from the *East*, and being captured on board that ship, settled in this country as a merchant, and obtained restitution; yet, on consideration that the original voyage, which was to *Ostend*, was not performed, the Lords of Appeal did not think proper to depart from the general rule, but rejected the demand for freight. — If the question depended in any degree on the estimate of advantage or loss, it might be shewn that the claimants have suffered a considerable inconvenience, by the delay that has been occasioned in bringing these goods to market, by the expence of obtaining restitution, and by the disadvantage of selling at last in a glutted market, instead of the markets on the *Continent*, to which the goods must now be sent on an ulterior destination.

In reply, it was answered, — Mr. *Constant* was a native of *Switzerland*, who was returning to that country, and claimed in a *Swiss* character. The original destination of himself and his property, was to *Switzerland*; but when he was brought in, and detained a considerable time, in prosecuting his claims, the public events that took place in his own country, as well as other private connections which

The DIANA.

Dec. 19th, 1803.

he formed in *England*, over-ruled his first purpose, and induced him to settle here. The goods were claimed, and restored as *Swiss* property, destined to *Ostend;* and therefore, the *original contract* and the purpose of the shipper, not being fulfilled, the old rule fairly applied. Here the special consideration is, that the claimants receive their goods in their own country, and, according to their own petition, in the very port to which they would have consigned them, if they had not been compelled to seek a destination to *Holland*, for want of a direct conveyance to this country.

JUDGMENT.

Sir *W. Scott.* — This is a question of freight, in which I have to determine whether these cargoes, taken before hostilities, and brought into this country, should pay freight, having been destined to another country, under the original contract. Something has been thrown out in argument, as if the Case of the *British* Proprietors was to be more favourably considered, because, this being a seizure prior to hostilities, the Prize Interest vests not in the immediate captor, but in the Crown, and because the captors may expect to receive ample remuneration from the bounty of the Crown. Whether the condemnation of these ships passes to the Crown, or to the captors, can certainly make no difference. The claimants will have the same right against the private captor, as against the Crown, and no more. They will have a right to restitution of their property, under the relief which has been afforded to them by the special instructions of the Crown. Whether the *freight* is to be considered as a part of their property

The DIANA.

Dec. 19th, 1803.

property is the question now to be determined. If *that* has accrued by right of war to another, *it is not their property* under these instructions, neither are they at liberty to argue on any conjecture, as to what the liberality of the Crown may give to the individual captors; whether the whole, or what proportion, is a matter with which they have no concern.

There are two rules on this subject equally general: The first is, that if goods are not carried to their original destination, within the intention of the contracting parties, freight *shall not* be due; and on this ground, that the contract not being completed, either in substance or form, the speculation of the party has not been productive. The benefit of the contract is lost, and the party has to provide another vehicle, to carry on the goods to the port of their destination. In some cases, indeed, it may happen that the port to which the goods are brought, may prove more beneficial, and afford a better market. But the Court does not enter into the minutiæ of such calculations, which would be attended with great trouble in the inquiry and much uncertainty in the result. It takes the presumption arising from destination only, and founds upon it the general rule, that, in such a case, the claimant *shall* receive restitution of his goods without the burthen of freight. The other rule equally general, is, that when the contract *is* executed, by bringing the cargo to the place of destination, the captor, to whom the vessel is condemned, *shall* be entitled to the freight which has been earned. He stands in the place of the owner of the ship, and is held entitled to the price of the services which have been performed in the execution of the contract. In some instances it may prove *disadvantageous* to the

The DIANA.

Dec. 19th, 1803.

claimant; and it is certainly a clear inconvenience in all cases to be obliged to receive the goods under the process of a Prize Court, subject to the expences which may have been incurred, or to the delay of further proof, instead of taking them with more facility in the course of their original consignment. But on the same principle the Court declines, on this side also, to enter into a minute estimate of these circumstances, which must in every case branch out into particulars of infinite variety. It constructs a general rule on the same grounds of presumption, which it assumes on the other side, and decrees freight to be paid to the captor, in the same manner as if the goods had been delivered under the original consignment. These are two classes of cases, and the question is, under which class the present case falls, or whether it may not form a third and distinct class, founded on peculiar circumstances, and requiring a rule not strictly applicable on the same precise ground to either of the other two. What are the facts? The claims were given by persons of this country, on a representation, that these goods were going on a destination which was obtruded on them by the narrow policy of *Holland*; that having themselves elected this country, as the most eligible country for importation, they were compelled to send their goods to *Holland*, though with the final intention, on their own parts, to have these goods remitted either in specie or in proceeds to this country, as the country to which they would immediately have consigned them, if at liberty so to do. Now I cannot but think, that this fact forms a material fundamental basis for the rule which is proper to be applied to such cases; for although the voyage has not

The DIANA.

Dec. 19th, 1804.

not been precisely that described in the contract, it is *that*, which the parties themselves would have elected, if not prevented and diverted by the overruling policy of the foreign country. As to what is said of the disadvantages which the claimants may have sustained, the Court enters not into such considerations, and for the reasons described. It is not in the habit of doing it, in cases falling under either of the general rules which I have mentioned. Indeed, the parties are in a great measure stopped from averring, that the arrival in this country is not beneficial to them, by having framed their application on a previous averment of their wish and final determination to have brought the produce hither, if they had not been restrained. They must be presumed to have formed this determination, on a view of all the advantages and disadvantages that were likely to proceed from it. At the same time, though I will not enter minutely into the question, I cannot but observe, that they have received restitution in their own ports under their own eye, and where the delivery has been in *London*, in a port which has been the great depôt of articles of this kind for some years, and may be supposed therefore to be a port eminently beneficial. As to what is said of the delay or expence of obtaining possession through litigation, those inconveniences are not more than may be imputed to other cases falling under the old rules. Once for all, on that subject, it cannot be expected that the merchant in time of war should obtain possession of his goods seized, with exactly the same convenience, as he would have done, under the original consignment in time of peace, and when none of the

The DIANA.

Dec. 19th, 1803.

the accidents of war had intervened to interrupt the delivery.

Looking at the substance of the case, and seeing that the parties have obtained restitution in their own country, and generally in the very port which they would have elected, if they had not been diverted by over-ruling necessity, I think it may be considered as coming under the second rule, or, if, not under that, under another resting on nearly the same principles. The case of the *Etrusco*, which has been cited, was a case of a ship that had come from the *East Indies*, almost to the port of her destination, which was *Ostend*. The claimant was a *Swiss* gentleman, who was brought hither solely in consequence of the capture, and who was *afterwards* induced to settle in this country by circumstances of a private and domestic nature. That case therefore bears no real resemblance to this. It would have been precisely a parallel case, if by any physical possibility, the ship and goods could have gone to *Switzerland;* or if the parties could and would have sent them there, if not obstructed by the authority of a hostile power. If either of these cases could have happened, will any body say that freight would not have been decreed? In that particular case, the Court of Appeal would not enter into the subsequent history of the claimant, though it is impossible not to remember that a good deal of commiseration mixed itself with the considerations on which that judgment was formed. On the reasons which I have stated, applying only to the circumstances of this class of cases, and not to be made a ground of experiment for similar demands, in other cases not attended with the same original facts, on which

Dec. 19th, 1803.

which this case is to be decided—not because the result in coming to these ports may have been more beneficial to the parties, but because the intention of the parties, as they have themselves stated it, has been substantially fulfilled, and the goods have been delivered to their possession in the very country (*a*) to which they would have wished them to have come, I pronounce these to be cases in which freight is due.

THE FREYA, JORDT.

Dec. 20th, 1803.

Damage sustained during quarantine, owing to the unsuitable nature of the place assigned for quarantine, repaired by Government.

THIS was the case of a demand for damages on the part of a *Danish* vessel captured on a voyage from *Cette* to *Amsterdam*, and brought to *Dover*. On arrival at *Dover*, it became necessary that the ship should perform quarantine before she could be admitted into the harbour. The place assigned for this purpose proved unfit for a vessel of her form, and it appeared that the master had represented the structure of his vessel as requiring a particular birth, and had received a promise that she should be laid in flat water.

On these facts the Court said — That no blame attached to the captors in this case; but since it had happened to a neutral vessel, brought in by force,

(*a*) On the claims restored to foreign merchants, no freight was paid — *Hoop, June* 15th. In the case of the *Vrouw Henrietta*, 23d *March*, on the claim of Mr. *Ancrum*, a merchant of *London*, a distinction was taken that the goods were not brought to *London*, but were unlivered at *Plymouth*, and therefore that they had not been brought to the claimant's own port. — The Court overruled the distinction, and held that parcel of goods to be equally subject to freight.

that

The FREYA.

Dec. 20th, 1803.

that an unsuitable place for quarantine had been assigned, and that the vessel had received considerable injury from that circumstance, it seemed but proper that the matter should be represented to Government as a damage fit to be redressed from that quarter; since it had happened under the management of the public officers of the port, though without any misconduct imputable to them.

Jan. 10th, 1804.

THE SPES, CORNELIS, AND THE IRENE, LUBBEN.

Blockade of the *Elbe*. — Directions of the owner, respecting the probable continuance of the blockade, will not justify a ship in coming to the mouth of the blockaded port for inquiry.

THIS was a case of two vessels proceeded against and condemned for a violation of the blockade of the *Elbe*. (*a*)

On the part of the Captors, the King's Advocate stated — That it appeared in evidence that the owner of the vessels was connusant of the blockade; but that he nevertheless wrote to the master, informing him of it, and directing him to continue his course till he was warned, and turned away. That the vessel sailed accordingly for the *Elbe*, and was captured, in the attempt to enter that river, by one of the blockading frigates.

On the other side, Laurence. — The blockade, under which these proceedings arise, is of a very peculiar nature, being imposed not against the trade of *Hamburgh*, but upon the mouth of the river *Elbe*, owing to the possession which the enemy had taken of the adjacent country. The novelty of such an event,

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(*a*) The notification of the blockade of the *Elbe* appeared in the Gazette, 28th *June*, 1803. *Weser*, 26th *July*. *Havre*, 6th *Sept*.

and

The SPES AND IRENE.

Jan. 10th, 1804.

and the peculiarity of its nature, may justly entitle the parties to an interpretation of *their conduct, very different from what might attach upon them*, if the case had arisen on the violation of a blockade imposed on the *ports* of the enemy. In such a case the neutral merchant would have no excuse for engaging in premature and unauthorised speculations on the termination of such a blockade; but in the present case a blockade against the enemy in the interior, might be presumed not to be co-extensive in its consequences, and equally permanent with a blockade imposed on the enemy's own ports. It might be expected to be of short duration, and such was the general opinion at the time. Notice had been given in *June?* The vessel did not sail from *Archangel* till *November*. In the intermediate time, and at that distance, there was ample room to suppose, that the blockade had been removed; and intelligence to this effect was given to the master by the *Hamburgh* Consul at *Archangel*, and transmitted also from his owners at *Hamburgh;* in such an uncertain state of things, the contingent orders given to the master, were nothing more than have already been allowed to *American* vessels, sailing under an ignorance of what may be the state of public affairs in *Europe*. The orders to go to *Norway*, on the first intimation of the continuance of the blockade, must be taken also, as part of the instructions—and if obeyed, as it appears they were by the declaration of the master, who, at the time of the seizure, said he was going to *Norway*, they would have the effect of removing all actual, as well as all intentional offence, and entitle the parties to the benefit of a deviation.

JUDGMENT.

The Spes and Irene.

Jan. 10th, 1804.

JUDGMENT.

Sir *W. Scott.*—These cases stand upon one ground, being the cases of ships belonging to the same owner, going from *Archangel*, with an avowed purpose of entering the *Elbe*. The master of the *Irene* had, as it appears, received a letter from his owner, giving notice of the blockade, but expressing an opinion, that it would not be of long continuance. Under this expectation he was directed to proceed on his intended destination, to come off the *Elbe*, and to inquire whether the river was then under blockade or not. It has been contended, that the blockade of the *Elbe* is to be considered on different principles from those that are applied to other blockades, inasmuch as it is a blockade not imposed upon the *country*, but on the enemy in the interior; that it was directed principally against the enemy; and that it is only incidentally, and by unavoidable consequence, that the trade of the neutral neighbourhood is made subject to it. This representation is to a great extent true, and may, under circumstances that admit of any latitude of interpretation, entitle the parties to all the indulgent considerations that can fairly be applied to their case. —But all the general consequences of such a blockade must be supposed to have been duly considered by the Government imposing it; and when the measure is once applied, the Court is under the necessity of enforcing it, on the only principles, on which any other blockade ever has been, or can be established. Were the Court disposed to desert those principles, and to wander into new speculations respecting blockades, I do not observe, that the gentlemen have even suggested the new principles on which it could act. The Court is therefore under the necessity of applying

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The Spes and Irene.

Jan. 10th, 1804.

ing the same general principles, on which all former decisions on this right of war have been founded; though in so doing, it would be disposed, undoubtedly, to apply them leniently, and with attention to every circumstance that could entitle the parties to favourable considerations. Then what are the facts? These ships had both received notice from the owner, that the *Elbe* was, at that time, in a state of blockade. It has been said, that no such intelligence had been received from the *Consul of the State of Hamburgh;* though I must presume it had, because as the notification was made to the Consul here, it was his duty to make the communication to the Consuls of his Government in foreign ports. And as the information had arrived at *Hamburgh*, and had been actually communicated from thence to *Archangel*, by private channels, the same communication must be supposed to have been made from public authority to the public Minister; or, if not, if there had been any neglect, the consequence must be imputed only to the State and its officers, who are answerable to their subjects for the consequence of their neglect. It is said, indeed, that the masters received contrary information from their Consul, and that they were told by him that the blockade was raised; though the averment does not, I perceive, distinctly state that, as appears by the evidence in this very case, but only that it would be raised before they arrived. Had the information been more positive, it would be difficult to attribute to it any such effect as would serve to the indemnification of these parties. If this conjectural information at *Archangel* proved false, they must look for redress to their own Government, or to those employed under it, who gave such erroneous intelli-

The Spes and Irene.

Jan. 10th, 1804.

intelligence. If the information of foreign ministers could be deemed sufficient to exempt a party from all penalty, there would be no end of such excuses. Courts of Justice are compelled, I think, to hold as a principle of necessary caution, that the misinformation of a foreign minister cannot be received, as a justification for sailing in actual breach of an existing blockade. The letters of the owner inform the masters that the blockade would probably be at an end before they arrived, and direct them to proceed for the *Elbe*. Are these the orders which owners ought to have given? I think not. The neutral merchant is not to speculate on the greater or less probability of the termination of a blockade, to send his vessels to the very mouth of the river, and say, if you do not meet with the blockading force, enter— if you do, ask a warning, and proceed elsewhere. Who does not at once perceive the frauds to which such a rule would be introductory: The true rule is, that after the knowledge of an existing blockade, you are not to go to the very station of blockade under pretence of inquiry. It is contended, however, on this point, that the parties are entitled to the same equity as was allowed to *American* vessels during the last war. But what was that? That ships sailing from *America*, before the knowledge of the blockade had reached *America*, should be entitled to a notice, even at the blockaded port; and that ships sailing afterwards, might sail on a contingent destination even to that port, with the purpose of calling at some *British* port, or at some neutral port for information; and that they should be allowed the benefit of such a contingent destination to be ascertained and rendered definite, by the information

which they should receive in *Europe*. But in no case was it held that they might sail to the mouth of a blockaded port to enquire whether a blockade, of which they had received previous formal notice, was still in existence or not. If particular parties are innocent in their intention, it is still a measure of necessary caution, and of preventive legal policy, to hold the rule general against the liberty of enquiring at the very mouth of the blockaded port, which would amount in practice to a universal licence to attempt to enter, and, on being prevented, to claim the liberty of going elsewhere. It is next contended, that the master on being brought to, said, that he was not going to a blockaded port, but that he would go, in obedience to his instructions, to a port in *Norway*, and therefore that the claimant is entitled to the benefit of a deviation. But this comes too late; he was taken in the act of going towards the blockaded port. The act is, in my opinion, to be taken as completed by the attempt. If the owners are innocent, they must, in law, be bound by the indiscretion of their agent. But this is not a case of persons suffering merely by the misconduct of their agents. The owners here are directly implicated by the instructions which they themselves have given. It may fall hardly upon them, but I feel myself obliged to pronounce, that there would be no principle, upon which a blockade could be enforced, if such excuses as these were to be admitted; and that these vessels are subject to condemnation.

Jan. 11th, 1804.

THE TWILLING RIGET, METZ. (a)

Freight, at what rate chargeable, on captors, for a cargo condemned? not necessarily to be taken at the chartered price, as raised by considerations of danger, and difficulties, arising out of the war.

THIS was a case on objection to the Registrar's Report, respecting the amount of freight, that was to be paid to this vessel and several other ships, under a Decree of Restitution *with freight*. They were ships that had been captured on a voyage from *Batavia* to *Copenhagen*, under an affreightment to Mr. *De Coninck*, and employed in transporting to *Europe* the quantity of *Batavian* produce which that gentleman had purchased under contract with the *Dutch East-India* Company.—*Vide* Adm. Reports, vol. iv. page 121.

The Act of Court set forth, on the part of the owners, that the ship had been chartered at *Copenhagen*, in *June* 1798, to perform a voyage to *Batavia* in ballast, and back to *Copenhagen*, with a cargo, at the freight of 60,000 dollars, being equal to about 120 rix dollars per ton. In the report, the Registrar and merchants were disposed to consider this freight as above the just rate, and allowed only what other ships appeared to have contracted for, about the same time, 95 dollars *per* ton. The freight was calculated at that rate, on *the burthen of* 365 tons, whereas it was stated as a material objection, that the tonnage in the *East-India* trade is not confined to the ship-builder's measurement, but that there is an option allowed, of taking either that measurement, or another known rule, according to the proportionate bulk and weight of certain articles.

(a) Late War.

On

The TWILLING RIGHT.

Jan. 11th, 1804.

On this point, Laurence and Robinson.—The principle of allowing to neutral ships their freight must necessarily be taken with reference to the actual affreightment under which they were employed, unless that contract can be impeached as *fraudulent*, or as so extravagant as to be utterly irreconcileable with the general course of commerce at that time. In this case, it is not attempted to impeach the terms on any such grounds. A third part of the price has actually been paid; and it is certified by Mr. *De Coninck*, who has no interest in this question, that the terms were the lowest terms, which he was at that time able to procure. It is however said, that, in the *September* preceding, he had chartered two other ships, at the rate of 95 dollars *per* ton; and because those cases happened to come to the knowledge of the Registrar and the merchants, that price is taken as the basis of the calculation, although it is notorious that nothing in trade is liable to greater fluctuation than the price of freight, according to the demand for shipping, and a thousand other circumstances that may affect the market. A second material objection to the report is, that the Registrar and merchants have taken the tonnage at the ship-builder's admeasurement only, without reference to the mode on which freight is calculated in the *East-India* trade, by which this ship did actually carry 504 tons. For instance, it appears to be the course of this trade in *Denmark*, that, when ships are chartered by the ton, an option of estimating the freight is always allowed to the master to take it either at 2000lbs. weight, or at 37 cubic feet, —that some articles, such as sugar, tin, and wood, are usually charged by weight, whilst other articles

The TWILLING RIGET.

Jan. 11th, 1804.

are usually reckoned by cubic feet measurement, and the result is according to Mr. *De Coninck*'s affidavit, that coffee and pepper make about 1380, or or 1385lb. *per* ton, but never so high as 1400 — that of cotton yarn 37 cubic feet weigh only 800lb. — that this article cannot be reckoned at more than 800lb. — and that other goods, as well spices as indigo and camphire, produced about 1000lb. *per* ton. The Court asked, whether the report had been framed with any reference to this mode of calculation, and on being informed that it had not, directed the report to be reconsidered under the observations, which were fully stated in an affidavit of Mr. *De Coninck*.

On the other point, the King's Advocate contended — That the Registrar and merchants were by no means bound to adhere to the charter-party in the allowance of freight; even when no imputation of fraud or improvident extravagance could be fixed upon it; that when the price of freight was much enhanced by the difficulties and perils of war, or by a mode of navigation arising out of particular speculations of interest, ships engaging in such hazardous or peculiar trade, were not at liberty to charge to the captors the rate of freight which they might, under very honest intentions, have contracted to receive from the owner of the cargo. That this was decided in the case of the corn ships, in the beginning of the last war, and in the provision-ships from *America*, which had contracted for a profit of near 80 *per cent.* owing to the distress of *France*, but yet no more than a reasonable profit was allowed. That the course of trade in which the ships were engaged,

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in the present case, was as little entitled to be favourably considered as any could be, since they had been engaged in a course of trade wholly unknown to them before, to convey to *Europe* the produce of the *Dutch* settlements of *Batavia*, sold under a contract which the Court had already pronounced to be illegal.

The TWILLING RIGET.

Jan. 11th, 1804.

JUDGMENT.

Sir *W. Scott.*—It is agreed on all sides, that these cases must go again before the Registrar and merchants, to be reconsidered, on the objections that are made to the mode of calculating the burthen. It will, therefore, not be necessary for me to say much on that point, or to give any precise judgment upon the case at large; because if it should happen that they see occasion to make a larger allowance on that score, it is probable that the difference between the parties may no longer be very material. At the same time I will say, that I perfectly accede to the principle that has been advanced, in support of the rule, on which the Registrar and merchant have proceeded, that the *charter-party is not the measure* by which the captor in all cases is bound, even where no fraud is imputed to the contract itself. When by the events of war, navigation is rendered so hazardous as to raise the price of freight to an extraordinary height, captors are not necessarily bound to that inflamed rate of freight. When no such circumstance exists, when a ship is carrying on an ordinary trade, the charter-party is undoubtedly the rule of valuation, unless impeached; the captor puts himself in the place of the owner of the cargo, and takes with that specific lien upon it. But a very dif-

The Twilling Rigst.

Jan. 11th, 1804.

ferent rule is to be applied, when the trade is subjected to extraordinary risk and hazard, from its connection with the events of war, and the redoubled activity and success of the belligerent cruizers. * It appears to me, that this is a case of that kind; and it may not be improper to advert a little to the nature of the commerce in which this ship was engaged, in the performance of a contract, which has been deemed illegal, both in this Court, and in the Court of appeal. In such a service, it could not but have been considered as an adventure of some hazard, to send ships on a new and experimental trade, which was, in its effect, to put Mr. *De Coninck* into the place of the *Dutch East-India* Company. The Owners would naturally look for their indemnification in an advanced freight, in terms, which might not be in any degree unfair, or unreasonable between the parties, considered as the premiums of a voyage eminently hazardous on account of its illegality, as against the rights of this country. Mr. *De Coninck* also might look for *his indemnification* to the *Dutch East-India* Company, in the price, at which he had obtained this contract, in consequence of their distress. Considerations of this nature might render it a *real* and fair contract between the parties; but the freight, as a burthen upon the *English* captor, does not come loaded with all these considerations, none of which apply to him. The cases of the corn ships, do, I think, bear a fair analogy to this case. I remember well, that in those cases a paper was thrown on this table, stating the price not to be unreasonable, under the opinion of some of the most respectable merchants of this town, that such would be the price paid by the *French* consignee

The Twilling Rigst.

Jan. 13th, 1804.

signee under the then distressed state of the *French* market. But the Court said, that they *mistook the principle*, and were deciding a question of law—viz. that the captor was in all cases bound to stand to the chartered price, if not impeached by the real prices of the market. The principle of that decision is not, in my opinion, improperly pressed into the present case; and it does sufficiently confirm the general position, that captors are not in all cases bound by the terms of the charter-party, though they may not be colourable, or liable to any imputation of fraud. At the same time, the Registrar and merchants will not depart from the charter-party without good cause, and without looking on all sides for information. Something has been thrown out, in argument, as if they had looked no farther than to the two particular cases, in which a freight of ninety-five dollars *per* ton has appeared to have been the freight stipulated for a similar voyage to *Copenhagen*, about the same time. I cannot suppose that to be the case: On the contrary, knowing their experience in matters of trade, their opportunities of information, and the strict sense which they entertain of their duty to the Court, and to the public, I am to suppose, that they look abroad on all sides, to obtain all possible information that may enable them to do justice between the parties. I consider their report not as an opinion, formed only with a reference to those two cases of Mr. *De Coninck*, but as the result of deliberate enquiries, by which they were led to consider this allowance as an adequate freight for such a voyage, under all the circumstances that were fairly applicable to it. Affirming

The TWILLING RIGET.

ing the general principle, I shall refer the report back for their re-consideration. (*a*)

Jan. 11th, 1804.

Jan. 21st, 1804.

THE INDUSTRIE, ROLFE. (*b*)

Expences of unlivery and appraisement, how marshalled under the circumstances of this case.

THIS was a question respecting the expences of unlivery and warehousing, viz. on whom they should fall.

King's Advocate.—In this case there has been a necessity for farther proof to obtain restitution of the cargo, which fully justifies the seizure, and made it necessary that the cargo should be unlivered, and lodged in warehouses. The expences incurred on this account can fall therefore no where but on the property—that is, on the claimant, if he obtains restitution,—on the captor, if the cargo is eventually condemned. Such has been the practice in number-

(*a*) In the amended report, the Registrar and Merchants formed their computation according to the tariff of the *East India* Company, for the regulation of freights in *India*; and allowed a farther sum. On this mode of calculation, also a farther objection was taken in the *Kron Prinds*, that it did not afford an adequate profit, not even an indemnification for the out-fit, and other risks on such a voyage.—That the mode of calculation by a proportionate estimate between the weight and bulk of articles was now admitted to be the true principle, according to the practice of the *East India* Company, though the allotment of weight for cubic measurement was greater according to that tariff, than in the calculation adopted in the *Danish* trade. That in taking this more favourable calculation as to stowage, the report should have taken at the same time the rate of freight given in the *East India* Company's trade, which was about 26*l. per* ton, considerably higher than the rate allowed in this report. The result of these objections will be noted, when they are finally concluded. (*b*) Late war.

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less instances, and no objection has been made to it. This consent can have proceeded only from the general understanding of the mercantile world, as to the propriety of such allotment. Since it is disputed, however, in this instance, it is hoped, that the Court will sanction by its decree, the rule which has hitherto prevailed on the general understanding and agreement of parties.

On the other side, Laurence. — However many cases may have passed by consent on this point, the Court will, it is presumed, pause a little before it gives a judicial sanction to any such rule. The captor is the person suing out the commission in the first instance, and if he is at liberty to do this at the expence of the cargo, he may, in many instances, collude with the master of the ship, and say, "take your vessel, and be gone," and thus send away the person whose duty it might be to claim, or at least to give the necessary information to the correspondent of the owners of the cargo. The cargo will be detained by these means in the hands of the agents of the captors to their emolument. The captor is the person first charged with the expence, and he cannot shift it off on the claimant, without shewing that it was specially necessary for the preservation of the cargo.

JUDGMENT.

Sir *W. Scott.* — This is the case of a cargo purchased in the colonies of the enemy, a trade exposed to particular suspicion, and in which the same degree of proof, which may be sufficient in ordinary cases, may not always be satisfactory. When the master sailed from *Hamburgh*, the claimants told him that they were the owners of the cargo, but gave him no instruc-

The INDUSTRIE. Jan. 21st, 1804.

instructions to claim for them in case of capture. On being brought into this country as a prize, he claimed the ship, but not with any precipitation, or in any such manner as to raise the slightest suspicion of collusion. The cargo required further proof: The master was under no obligation to stay for it, nor had the captor any right to detain him, or to make a warehouse of his ship. When the vessel is liberated, the cargo must be preserved somewhere. The use of warehouses becomes absolutely necessary, and for the benefit of those ultimately entitled to the property. Instead of being a measure likely to lead to collusion, between the master and the captor, it appears to me to be no inconsiderable check on the captor, that he should have this heavy expence to pay, if, at last, he obtains condemnation. He would rather be induced to keep the ship as long as he can. At present I shall abstain from laying down any general rule upon this question, without farther deliberation. Under the circumstances of this case, the expence appears to have been incurred from a necessity arising out of the cargo, and I shall decree them to fall as a charge on the property. (*a*)

THE OCEAN, HARMSEN.

Jan. 27th, 1804.

British merchant settled in *Holland* at the breaking out of hostilities, but taking early measures to remove — restitution.

THIS was a case of a claim given on behalf of Mr. *F*——, a *British*-born subject, who had been settled as a merchant in *Flushing*, but who, on the appearance of approaching hostilities, had taken

(*a*) In the case of the *Peggy*, *March* 8, 1804, a similar decree was made, that the captor should be liable to the Marshal for the expences of appraisement and unlivery, but that he should be considered to have a demand against the goods for such expences, to be charged rateably on all the property restored.

means

means to remove himself, and return to *England*. The affidavit of the claimant stated — that in the month of *July* 1803, he actually effected his escape, and returned to this country; that he had actually dissolved his partnership; and that he had continued to reside in *Holland* after the war, only under the detention so unwarrantably applied to all *Englishmen* resident in the country of the enemy at the breaking out of hostilities.

JUDGMENT.

Sir *W. Scott.* — This claim relates to the situation of *British* subjects settled in foreign states in time of amity, and taking early measures to withdraw themselves on the breaking out of war. The affidavit of claim states, that this gentleman had been settled as a partner in a house of trade in *Holland*, but that he had made arrangements for the dissolution of the partnership, and was only prevented from removing personally, by the violent detention of all *British* subjects, who happened to be within the territories of the enemy at the breaking out of the war. It would, I think, under these circumstances, be going farther than the principle of law requires, to conclude this person, by his former occupation, and by his present constrained residence in *France*, so, as not to admit him to have taken himself out of the effect of supervening hostilities, by the means which he had used for his removal. On sufficient proof being made of the property, I shall be disposed to hold him entitled to restitution.(*a*)

(*a*) So in the *Doornbaag*, restitution was decreed to *A. B.* removing from *Holland*, of a ship and parts of the cargo allotted to him on the dissolution of the partnership for the purpose of his removal.

Jan. 27th, 1804.

THE ISLAND OF TRINIDAD, *and its Dependencies, with the* Saint DAMASO, *captured in port, and other Ships destroyed, during the late war.*

Joint capture in the surrender of *Trinidad*, — Time of surrender how considered, not from the first negociation *for* capitulation. — Whether from the agreement to capitulate, or from the formal execution of the articles, *quære*. — The facts in this case did not render it necessary to decide that point.

THIS was a question on joint capture, as to the right of several ships to share in the capture of the island and its dependencies, and also in a *Spanish* squadron, captured by the *British* forces under the command of Admiral *Harvey* and General Sir *Ralph Abercrombie*.

JUDGMENT.

Sir *W. Scott*. — This question arises on the capture of *Trinidad*, as to the title of the several parties to share in the property taken at land, and in the capture of one vessel, and in the distribution of his Majesty's bounty on the destruction of others. The parties claiming to share stand on very different grounds, and the question is, which of these five ships are entitled to any, and to what part of this capture. The claims are given severally on the part of the *Alfred*, *Dictator*, *Bittern*, *Zephyr*, and *Pelican*. It appears that the *Zephyr* and *Pelican* were a part of the force originally destined on this expedition,

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removal. The situation of *British* subjects wishing to remove from the country of the enemy on the event of a war, but prevented by the sudden interruption of hostilities from taking measures for removing, sufficiently early to enable them to obtain restitution, forms not unfrequently a case of considerable hardship in the Prize Court. In such cases it would be adviseable for persons so situated, on their actual removal, to make application to government for a special pass, rather than to hazard valuable property, to the effect of a mere previous intention to remove, dubious as that intention may frequently appear under the circumstances that prevent it from being carried into execution.

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described *as an expedition for the capture of the island of* Trinidad, *and the destruction of a* Spanish *squadron which was known to be lying there.* These were the two objects of the expedition; and if I could go along with the argument, and consider these objects as inseparable, and as forming one integral capture, there might be less difficulty in determining on the whole claim of these two ships. The island, its fort, and ammunition stores, may be taken as one definite collected thing; but there is surely a great distinction between them, and such moveables, as a squadron of ships, which might be there to-day, and gone to-morrow. It would, I think, be a great deal too much to say, that the capture of the island is necessarily to be identified with the capture of the ships. The proceeding might probably be different for the reduction of these two descriptions of force. The ships might be taken months before the island; and if the captures were at different times, they would stand on very different considerations; and it would by no means follow that the *Zephyr* and the *Pelican* were entitled to share in the ships, because they might be entitled to share in the capture of the body of the island. Then what other principle is there on which the claim of these ships, as to the *St. Damaso*, can be sustained? It is said that they composed part of the original force sent on this expedition, and that if they were detached on any collateral purpose tending to the common service, they would still be entitled to share. I fear the facts will not bear out the position, since the purpose on which the *Zephyr* separated was, to chace a *French* privateer, which might have led her off to a very great distance. Can it be contended, that, if the transaction had taken place during her absence,

The Island of Trinidad, &c.

Jan. 27th, 1804.

The Island of Trinidad, &c.

Jan. 27th, 1804.

sence, she would have been entitled to share; I think not. If the detachment had been for a purpose clearly collateral, such as the fetching provisions or ammunition, it might have been different; but this is a distinct service on which the *Zephyr* was detached; and the *Pelican* separated by stress of weather, and had in effect never joined the squadron. The necessary facts, therefore, are not laid, on which the principle of association can be applied to their case, and it will be utterly impossible to sustain their claim on that ground. Then what other ground is there? I have already said, that the capture of the ships is not to be identified with that of the island; and therefore if it is contended that they are entitled by reason of having joined the squadron, it must be shewn that the junction had taken place at the time of the capture of the vessels; and this must be made out upon clear and distinct proof, and not merely upon evidence of a vague and conjectural nature. On this point there is indeed the evidence of a person, to whom the Court would be induced to pay great attention, as, to other distinguished qualities, he adds that of a mind entirely above all prepossession or bias. This gentleman, Admiral *Harvey*, states it "to be his opinion, that these vessels must have been in sight on the evening before the ships were set on fire, and the *St. Damaso* was taken." He states the grounds of his opinion, which appear to be perfectly rational and just, and if supported by the evidence on the part of the vessels themselves, they might have been very material. But the Court is bound to expect that the *being in sight* should be proved by some direct evidence, applying to the fact, and not merely by opinion, formed upon the conjectures of any persons,

sons, however respectable they may be. The result of the evidence on this point falls very short of the necessary effect. Mr. *Ward* says only, that "when they joined, they saw the remains of a frigate burning." This by no means proves, what can be considered *as a presence at the time*, when the destruction of some ships, and the capture of the *St. Damaso* took place. The manner in which the witness expresses himself rather implies, that they had been already destroyed; and it would be a construction very wild and unwarrantable to hold, that, if they arrived whilst the ashes were smouldering, they would still be in time. It is said, that they heard the explosion. — But it is a common phrase not more contemptible for being common, that hearing is not seeing; the explosion of such a body as a ship of war, would be heard to a stupendous distance. It is a well known fact, that, in the famous battle in the *Downs*, the explosion was heard in *St. James's Park*, and was made the foundation of a mathematical calculation by *Sir William Petty*, with respect to the velocity of the progress of sound; so, with regard to the conflagration, the atmosphere would be illuminated to a prodigious distance, but it would be ludicrous to say, that all, who were within the reach of these appearances produced by the fire, are to be taken in law as present at the occurrence itself. As to the *St. Damaso*, that vessel was taken afterwards without conflagration or explosion, *sub silentio* and *sub tenebris* both. Upon the whole case of these two ships, then, I am of opinion, that the purpose on which they had separated, was not collateral or subservient to the general design, but divergent and distinct; that they were not present at the capture

and

The Island of Trinidad, &c.

Jan. 27th, 1804.

and destruction of the squadron, and that it would be going much farther than the Court is disposed to go, to say that they can be entitled to share in that part of this capture. As to the capture of the island, it does appear that they were in sight the preceding evening, and therefore whether the point of capture is taken, either at the first overture for surrender, or at the capitulation, or at the formal signing, these ships were clearly present, and entitled to share in that part of the general capture. The claims of the three other ships stand on a different ground. The *Dictator* and the *Alfred* had not been under the command of Admiral *Harvey* before, but had been sent to reinforce him, and join in the operations. The *Bittern* had been under Admiral *Harvey*, but had been sent away to *Barbadoes* for letters and dispatches, not with orders to join specifically at *Trinidad*, but wherever she could find him. As to these vessels, the question is, Whether they had arrived in such time, as to be present at the actual reduction of the island? which makes it necessary to determine, what is to be taken as the time of capture, whether the first overture of surrender on the evening before, or the final agreement, or only the actual signing of the capitulation; it being equally clear, and admitted, that at the first period, they were *not* present, at the two latter periods, *they were*. Now, I cannot but think, that it would be too much to say, that the transaction of the evening before their arrival was a complete and absolute agreement, because many things might have occurred to defeat such a negociation; and it would, I think, be to place an important question of this kind on a very uncertain footing, if the actual capture could be dated from the moment of the first overture.

overture. Terms were to be entered into: Of these some might be rejected as too hard on one side, or as too indulgent on the other. The negociation might, in the mean time be broken off. A disposition to surrender was expressed on the evening, but a great deal of deliberation was necessary on the reciprocal propositions. Frequent messages passed the next day under a flag of truce, which shewed that much was yet to be done. It would, I think, be too much to say, that the surrender could be considered as complete, till the next morning when the capitulation was actually agreed upon. At this time the ships were certainly in sight; Admiral *Harvey* says, "that they were there before the signature;" and he infers, I think, upon good grounds, that they had been seen from the island, and were themselves within sight of the island, before they were descried from the fleet. The evidence does afford a reasonable presumption, that they were there before the actual agreement of surrender; and therefore without bringing into discussion, how far it might have been sufficient to have arrived before the signing and formal execution of the articles, I shall pronounce them entitled to share in the capture of the island, but not in the capture of the ships which took place the evening before.

The Island of Trinidad, &c.

Jan. 27th, 1804.

NOSTRA SIGNORA DE BEGONA, Ybriniga.

Jan. 31st, 1804.

Contraband *rosin* to a port not of a military equipment, *not contraband.*

IN this case a question arose respecting the contraband quality of rosin, going from *St. Sebastian* to the port of *Nantes.*

NOSTRA SIGNORA DE BEGONA.

Jan. 31st, 1804.

On the part of the captors, the King's Advocate contended — That it was an article much used as an ingredient in various military preparations, and that it was to be deemed contraband.

JUDGMENT.

Sir *W. Scott.* — Are there any cases in which this article has been held to be contraband, on a destination to a port merely mercantile? If it had been going to a military port of the enemy, I should have had no hesitation, as there are many cases in which, under such circumstances, it has been deemed contraband. — Going to a mercantile port (*a*), it is not, I think, so decidedly of a warlike nature, as to be excluded from the favourable considerations that are applied to other articles *ancipitis usus.* I shall therefore decree restitution.

Feb. 7th, 1804.

LA VIRGINIE, COIGNEAU.

National character of a native *Frenchman*, an asserted *American* subject, but personally present in *St. Domingo*, shipping goods for *France*, and described in the evidence as a *French* merchant. The native character held to be revested.

THIS was a question on the national character of the claimant Mr. *Lapierre*, claiming property shipped by him in *St. Domingo* for *Bourdeaux*. The affidavit of claim stated him to be an *American* subject; and in his attestation, which was exhibited in further proof, it appeared that he had sailed from *New York* to *St. Domingo* in *September*, 1802.

In support of the claim it was argued — That he was to be taken as a person domiciled in *America*,

(*a*) *Santa Bona Ventura.* Rosin, on board a *Portuguese* ship to *Nantes*, restored to the owner of the ship. *Dec.* 12th, 1747.

though

though absent on temporary business in the colony of the enemy at the time of the shipment; that it did not appear how soon he had again returned to *America*, farther than that he was there in *August*, 1803, when the attestation was made.

On the other side it was said — That his name implied him to have been a native of *France*, and that his return to *America*, after hostilities, would not operate to protect this property, shipped by him as a person resident in *St. Domingo*.

JUDGMENT.

Sir *W. Scott.*—I should entertain no doubt in this case, if it appeared that Mr. *Lapierre* was originally a native of *France*, because it is always to be remembered, that the native character easily reverts, and that it requires fewer circumstances to constitute domicil, in the case of a native subject, than to impress the national character on one who is originally of another country. If it could be inferred, that he had been originally a *French* merchant, and was at the time of shipment resident in *St. Domingo*, and shipping property to *Old France*, I should have no hesitation in considering him as a *Frenchman*. Had the shipment been made for *America*, his asserted place of abode, it might have been a circumstance to be set in opposition to his present residence, and might afford a presumption that he was in *St. Domingo* only for temporary purposes. But this is a shipment to *France*, from a *French* colony, and if the person is to be taken as a native of *France*, the presumption would be, that he had returned to his native character of a *French* merchant. Then as to the point,

La Virginie.

Feb. 7th, 1804.

on which I say the only doubt remains, the depositions of the master may, I think, be taken to supply that deficiency. He says, "that he received the cargo *from French merchants*, and that it was *the property of the laders and other French subjects.*" This representation does very much fortify the presumption, that Mr. *Lapierre* was considered by the master as a *Frenchman*, and that he was resident at *Saint Domingo* on the ordinary footing of other *French* merchants. On this view of the case, I shall pronounce his claim *subject to condemnation.*

Feb. 13th, 1804.

THE ANNE, Bicknell.

(Instance Court.)

Claim of salvage on rescue of a slave ship, not substantiated.

This was a case of salvage, brought by the owners and master of the *Elizabeth*, a slave ship, for salvage services alleged to have been rendered to the *Anne* on the coast of *Africa.*

It appeared that the *Anne* had been in considerable distress from an insurrection of her slaves, but that this insurrection had, in fact, been quelled by her own crew, on the night before the *Elizabeth* came up. A second insurrection was alleged on the part of the *Elizabeth*, but not proved. On this and other facts relied on in numerous affidavits, the Court expressed an opinion generally to the following effect.

Judgment.

Sir *W. Scott.*—This demand is made against the ship and a valuable cargo for salvage, but I do not think

think that the claim is in any degree supported. Two pleas are set up: First, a rescue from an insurrection of her own slaves; but that appears to have been subdued before the *Elizabeth* came to her assistance. A second insurrection is also alleged of the *Butlers* and *Linguisters*, who are officers of the nations of the coast, with whom they were carrying on their traffic; but this is not in any manner proved. A different turn is now attempted to be given to the claim of salvage, by resolving it into a a general superintendance, and assistance rendered to the master of the *Anne*, who was almost entirely deprived of his own crew, and was himself disabled from continuing in the command and management of his vessel, by illness. Several of the people who appear to have gone on board to render assistance, were paid at the time. In the whole circumstances of the case there is not a pretence for constructing a claim of salvage on such services. If any rescue had been effected out of the hands of the insurgent slaves, I should have pronounced for salvage, as I did in a former case. For although there may be a general duty incumbent on all persons to render assistance to others in distress, yet when there is a danger incurred, and a rescue effected, it appears to me to be an act justly entitled to remuneration, as a salvage service. No such case is made out by these parties, and I shall dismiss the suit.

Supra, vol. 4. p. 2.

Feb. 17th, 1804.

THE REBECCA, MADDICK.

(Instance Court.)

Bottomree bond put in suit originally on the part of a *French* merchant in 1792 — suspended during the last war — not enforced during peace, but now attempted to be farther prosecuted on the part of the British merchant, to whom it was endorsed — not allowed to be put in execution under the original proceedings.

THIS was a question on a bottomree bond, executed in *Marseilles* in 1792, by the master of an *English* vessel, to Mr. *Guerin*, a merchant in that city. The warrant was extracted 24th *December*, 1792, by Mr. *Thellusson*, on the part of the *French* merchant.

On the breaking out of the war, the defendant appeared under protest pleading alien enemy. In 1796, an answer was given in to the protest, and a reply to that answer, and nothing since was done by the parties till *March*, 1803, when Mr. *Thellusson* continued the proceedings in his own name, stating that the bond had been transferred to him, that he had paid the money, that the original bond-holder had become a bankrupt, and that he had no other means of recovering re-payment of the money advanced.

Against the bond, Arnold and Swabey contended — That the same objection that existed in 1793, "*of alien enemy*," applied equally at this time; and that the bond could not be enforced now in favor of the original holder; that the opportunity of recommencing the suit in the interval of peace had been waived; and that after this lapse of time, the other party would naturally consider himself as relieved from all farther observance of justice on this demand; that as he had appeared originally under protest to the jurisdiction of the Court, it was not necessary that there should be a formal dismissal, that it would not be reasonable that the suit should now be taken up *de novo* on the part of Mr. *Thellusson*.

On

The Rebecca.

Feb. 17th, 1804.

On the other side the King's Advocate and Robinson contended—That the interest in bottomree was in its nature transferrable, and had in this instance been regularly transferred, by indorsement, to Mr. *Thellusson*, in the course of his dealings with the original holder; that the first commencement of these proceedings was in *December*, 1792, before hostilities, and when the objection of alien enemy did not apply; that with respect to the original holder, as there was no objection to his competency at that time, his right would have revived after the cessation of hostilities; that, in the present form, the objection to the *persona standi in judicio* would be obviated as well by transfer to an unobjectional person, as by a removal of the obstacle applying only to the original holder by reason of the war existing between the two countries; that it was but a question of form, whether the proceedings, on the part of Mr. *Thellusson*, should be engrafted on the former proceedings, or be commenced *de novo*; and that it was not a conscientious objection to be made on the part of the Defendant —for whom the money had been received, and *bonâ fide* converted to the service of his ship.

JUDGMENT.

Sir *W. Scott.*—The warrant in this case was taken out in *December*, 1792, by Mr. *Thellusson*, describing himself as the agent of Mr. *Guerin*, a *French* merchant now become an alien enemy, and consequently a person, on whose behalf the Court could not, on any general grounds, sustain the claim, or enforce any interest. This has been at all times so fixed a principle in these Courts, that even in cases of ransom, which

The REBECCA.

Feb. 17th, 1804.

were formerly legal contracts, and contracts arising out of the events of war, the ransom could not be put in suit on the part of the enemy: Proceedings were always carried on against the owner in the name of the hostage suing for his liberty. It is true, indeed, that a bottomree bond is a negociable interest, which may be transferred and put in issue by the person so acquiring it. But the *French* merchant is the person here described as interested, who now stands under the same incapacity as he did before, Mr. *Thellusson* being only the agent instituting the suit in his behalf. There can be no doubt, therefore, that the original protest was well founded. The parties should have been dismissed, and then the action might have been entered on the part of the present holder in his own right. But this has not been done,—and now, after an interval of twelve years, during *all which time*, I am told, that Mr. *Thellusson* might have followed up the proceeding on his own behalf, I cannot think it a reasonable demand on the Court, to give parties the advantage of a stale and antiquated claim, to suffer them to make the Court the depositary of their slumbering rights, and then to come and revive them, when from lapse of time it is become utterly impossible to ascend to the whole justice of the case. It is said, that there is no statute of limitations applying to such a case.—Perhaps not. Indeed there are few questions in these courts, to which any precise limitation is prescribed; but there is surely a principle of limitation, in the administration of every system of jurisprudence, to be derived out of the nature of things, which does entitle the Court to avail itself of the universal maxim "*Vigilantibus, non dormientibus*

bus subveniunt leges." In questions of bottomree, more especially, the Court is bound to expect particular vigilance; because, although bonds of this kind are to be supported with a high hand, when clear and simple, they are, in many respects, things to be narrowly watched. Bottomree is a transaction which affords great opportunities of collusion; and therefore on the very account of the importance given to these bonds, they are to be pursued with exact attention, and with very active diligence, in order that the Court may have the opportunity of considering them in their recent origin, and with a view to all the circumstances on which their honest validity may depend. It may, perhaps, be difficult to point out the Statute Law, or precedent, by which this enquiry is barred; yet adverting to the considerations which I have thrown out, I do not think it incumbent upon me to lend the functions of the Court, to enforce a bond which has been suffered to sleep so long, after some of the parties are become bankrupts, and a thousand other transactions have mixed themselves with their affairs. The objection is not to be considered as resting wholly on form: Form, in this instance, is in no small degree the real substance of this case. The warrant was entered on behalf of persons now become alien enemies. *Their* claim the Court *cannot* sustain; and as to the interest of Mr. *Thellusson* under the transfer, it is not such a one as the Court will, after this interval of time, think itself bound to enforce. As the parties have appeared originally under protest to the jurisdiction of the Court, it will not be necessary that they should pray to be dismissed.

The Rebecca.

Feb. 17*th*, 1804.

Dismissed.

Feb. 17th, 1804.

THE FAMA, BUTLER.

National character of a place, agreed to be surrendered by treaty, but not actually transferred, continues as it was under the character of the ceding country.

THIS was a question respecting the national character of *Louisiana*, whether it was, at the time of capture, *May* 1803, to be considered as a *Spanish* settlement, or as belonging to *France*, by reason of the treaty of *Idelfonso*, 1796, by which it was ceded to that country. The question arose on the claim of Mr. ———, a merchant, resident at *New Orleans*, for property taken, *May* 1803, on a voyage from *New Orleans* to *Havre le Grace*.

On the part of the Captors, the King's Advocate and Laurence.—The claim in this case is given for persons avowedly resident in *Louisiana*, and the question turns entirely upon the national character of *Louisiana* at the time of capture. The vessel sailed on the 5th of *April*. Previous to that time, the settlement had been ceded to *France* by Treaty duly ratified, and Mr. *Laussart*, the *French* colonial prefect, had arrived, and taken upon himself the functions of government, by a proclamation issued there in his name on the 26th of *March*. This is a direct overt act of possession, and sufficiently implies, that the public authority of *Spain* had ceased, and had been actually transferred to *France*. The other evidence, that is to be collected from the papers of the several ships captured, coming from *New Orleans* about the same time, speaks to the same effect. Several letters mention the cession to *France* as having taken place. In a letter of the 21st of *April*, Mr. C—— writes, "I have availed myself of the arrival

"of

The FAMA.

Feb. 17th, 1804.

"of our colonial prefect, to put the ship *Hector* un-
"der *French* colours." By another letter of the 13th *June*, it appears, "that the *French* flag was to enjoy all the privileges of the *Spanish* character." In a letter of the 6th of *May*, it appears, "that "the *Americans* were prevented from sending goods "to that port, by the cession to *France*, and by "their uncertainty as to what restrictions *would be* "*imposed by* their new *neighbours*, on whom they "look with jealousy." — In the *Peggy*, it is stated, 12th *May*, that the King of *Spain* had appointed Commissioners for the delivery of the colony to the *French* Republic. All these passages concur in pointing out the *French* Governor, as the person exercising public authority and sovereignty there, and the *French* character as fully impressed. If the forms of the *Spanish* Custom-house still continued for purposes of present convenience, that circumstance alone will not counteract the effect of other evidence, since the exercise of public authority is the main point to be considered, without enquiring whether every subordinate officer had arrived, and whether the minute forms of every department of Government had been changed. If any farther evidence were wanting, it is abundantly supplied by the Act of the *French* Government, which proceeded under this possession, to exercise the right of transfer, and actually conveyed away the settlement to *America* by a Treaty of the 30th of *April*. It may be said, that the place would then bear the *American* character; but the answer is obvious, that although the treaty was of that date, it was not at this time ratified, and as the effect of a Treaty depends

The FAMA.

Feb. 17th, 1804.

pends entirely upon the ratification, the mere engagement on the part of *France* would not be effectual to impress the *American* character, at the same time, that it may be taken as an act of ownership, and as strong evidence of the complete possession which *France* conceived herself to have obtained of that colony.

On the other side, Arnold and Swabey. — Whatever engagements might been entered into by Treaty, the national character of the place could not be deemed to be altered, till that engagement was carried into effect, and actual possession had been conveyed under it. This is to be contended, on the simple principle common to all law, that possession is the substantial title of property, and that without that, the strongest speculative interest is only a right *to* the thing, but not *in* the thing, a right to demand possession, but not the full right of property itself. Till possession was actually given, no change of sovereignty can be held to have taken place. On this short statement of the general law, as applicable to all property, it will be sufficient to rest the whole question as to principle. It is material, therefore, to enquire what possession had actually been taken in the present instance. It is not necessary to dispute whether the whole establishment should have arrived or not; because here no part of the establishment could be said to have arrived, inasmuch as the constituent character, the person charged with the power of constituting this settlement to become a part of the *French* dominions, *had not* arrived. Mr. *Laussart* had been sent forward as a subordinate officer,

The FAMA.

Feb. 17th, 1804.

officer, to arrange matters for the delivery, but the capacity to accept delivery was never communicated to him, as the accredited officer of *France* for that purpose. A delivery to him, not authorized by some public commission to accept, would not have been a delivery in law to *France*, nor have enured to the due execution of the Treaty. That Mr. *Laussart* found means to circulate something like a public proclamation, is not necessarily a proof of sovereignty; his own letters, and several expressions to be found in these papers, shew that it was not so considered at *New Orleans*. One letter mentions only "that Citizen *Laussart* had published a high-"sounding proclamation, and that he was waiting "to see the effect." The proclamation itself does not contain a word indicating that he had taken possession. In another letter it appears more obviously that he had not, from these terms, "If the taking "possession had taken place, I should have given "the nationality to Mr. *Merrian*, and he would have "put himself in rule for obtaining it; as it has not, "I have recommended him to go to *France*, &c." In the letters of the *Peggy*, the mention of the *Spanish* Commissioner, and of the formal possession to be transferred, is spoken of as a thing *in futuro*, and as a form essentially necessary to invest the Government of *France* with the full and complete dominion. So the passages that have been referred to, respecting the *French* flag, describe it as intended to convey equal privileges, *as if the possession had taken place*, furnishing, in that expression, a necessary inference, that the actual possession had not been transferred. In addition to all this evidence, there

The FAMA. Feb. 17th, 1804.

there is the corroborating testimony of the *Spanish* Governor, in a certificate of *November* 18th, which states, "that *Louisiana* was then ruled and governed "by the *Spanish* laws, the cession by his Catholic "Majesty not having taken place. That although "Citizen *Laussart*, the colonial Prefect, had resided "in this city from the end of *March*, for the purpose "of concerting with the *Spanish* Government, ar- "rangements preparatory to the delivery; he had "not exercised, nor could exercise, any jurisdiction, "by reason that the power of the *Spanish* Govern- "ment continued entire till the moment of the act "of taking possession." On weighing the whole of this evidence, the Court cannot but be convinced, that no actual possession had taken place. As to what is said of the subsequent transfer to *America*, that proves no more than that *France* conveyed her right, whatever that might be—full possession, if she had obtained so much,—or a mere prospective right, if, in fact, her own title was executory only, and not at that time carried into effect.

In reply, the King's Advocate and Laurence.—The argument on the other side amounts only to this, that no formal surrender had taken place; but as to the importance ascribed to such a solemn act of delivery, it is not supported by any reference to authorities, nor is there any obvious reason pointed out for considering that circumstance as essential to determine the national character of the place. The substantial incidents of a *French* settlement are more to be regarded, than the mere ceremonial of formal surrender; and among the chief charac-

teristics of a national establishment, is to be reckoned that which appears in these cases, of an almost exclusive navigation to *France*. Could a public act of cession be deemed more material, than it has been shewn to be in the present argument, as between the two contracting nations, it would by no means follow that it was incumbent on a third power to acquiesce in all the subterfuges, by which it might be attempted to conceal the real character, and the substantial interests of the place. — The question has been argued only on the grounds of an ordinary transaction between the contracting powers.— Whereas this important circumstance is to be taken into the account — That the rights of war have interposed to modify and controul the general rules, by which the question of property and national character is to be decided. Among the limitations arising out of such a state of things, one of daily application in this Court is, that if the bargain is complete, and the price paid, no delay in transferring the title, with a view of keeping off as long as possible the risk of the Belligerent party, will prevent that *risk* (*a*) from attaching on him. It is the ordinary rule applied to shipments, made *for the account of* the Belligerent party, but under an agreement that the neutral merchant shall sustain the risk *in transitu*. Analogous to that collusive expedient of retaining a nominal title in the neutral merchant, to protect goods really become the property of the Belligerent, would be the situation of this settlement, if it could be maintained, that *Spain* might

(*a*) *Sally, Griffiths*, supra, vol. 3. p. 300, and other cases.

hold

The FAMA.

Feb. 17th, 1804.

hold a nominal possession for any length of time, for the benefit of *France*, by which *France* would reap all the advantages of a connection with the place, as a colonial establishment, without subjecting it to be considered as a *French* settlement. The conduct of the whole proceeding fully justifies such a representation. The agreement to cede was made clandestinely by the Treaty of *Idelphonso* in 1796. The price has actually been paid in the assignment of territory in *Italy* to one of the family of *Spain*. The benefit of a colonial establishment has been substantially conferred, and therefore the question is not, by what system of jurisprudence the Court shall judge of the form necessary to a complete surrender, but whether in effect *Spain* has not continued to hold this settlement for the benefit of *France*, and subservient to the purposes of the *French* Government. In this point of view, whatever may be the qualifications which the parties themselves may attempt to put upon the actual title of property and national character, the Court will consider the question in substance, rather than in form, and with reference to the rights of war, which a third party has acquired in the event.

At the conclusion of the argument, the Court mentioned a case of *Wroughton* against *Mann*, 1780, in which the question of sovereignty over a country ceded by Treaty, but not actually delivered, had undergone much discussion. The libel in that case was directed to be locked up, and the Judgment was reserved.

JUDGMENT.

JUDGMENT.

The FAMA.

Feb. 17th, 1804.

Sir *W. Scott.* — The present question is a general one, respecting the situation, in which the people of a distant settlement are placed, by a Treaty of the State to which they undoubtedly belong, and by which they are stipulated to be transferred to another power. The case proceeded for a considerable time without dispute as to principle, on a mere enquiry into the fact of possession; under an understanding, as I apprehend, that if possession *had not* been taken by *France*, the *French* character could not be deemed to have attached. The question has however now been fully argued as to the principle of law, whether the Treaty did not in itself confer full sovereignty and right of dominion, and whether the inhabitants were not so ceded by that Treaty, as to become immediately *French* subjects. Another question has also been started, respecting the Treaty of *Idelphonso*, whether such a Treaty made clandestinely, as it is said, *during hostilities*, and with a provision that it should not take effect till after the war, is not to be considered in the light of a fraudulent covering of *French* interests, for the purpose of defeating the Belligerent rights of this Country. This latter question cannot, I think, fairly be brought into discussion; nor is it necessary to decide, what would be the situation of a neutral country, delivering up its rights to one Belligerent, and continuing to nurse and feed the colony for the benefit of that Belligerent during the war. It is, I say, needless to enquire, in the present case, what rights of war would accrue to the other Belligerent from such a conduct; because *Spain*, very soon after the signing

The FAMA. Feb. 17th, 1804.

of that Treaty, became herself a party in the war, and was as much exposed to the attacks of this Country in all her settlements, as they could have been in the possession of *France*. It is impossible, therefore, that *Spain* can be said to have lent her aid and assistance as a neutral Country during the war, to nourish and protect this colony as a colony of *France*. On the return of peace, no objection in the way of protest or public reclamation was made against the Treaty on the part of this country. I shall therefore dismiss this branch of the argument, as not fairly supported by the circumstances of the case.— The other question of law, how far full sovereignty can be held to have passed by the mere words of the Treaty, without actual delivery, was in the first stages of this cause *not mooted*. As it has now been brought into discussion, it is fit that I should give my opinion upon it.

It is to be observed then, that all corporeal property depends very much upon occupancy. With respect to the origin of property, this is the Sole foundation, *Quod nullius est ratione naturali occupanti conceditur*. So with regard to transfer also, it is universally held in all systems of jurisprudence, that to consummate the right of property, a person must unite the *right of the thing with possession*. A question has been made indeed by some writers, whether this necessity proceeds from what they call the natural law of nations, or from that which is only conventional. *Grotius* seems to consider it as proceeding only from civil institutions. (*a*) *Puffen-*

(*a*) Que la deliverance de la chose meme que l'on transfére a autrui n'est nécessaire qu'en vertu des loix civiles. — *B. 2. c. 6. 1—4. Barbeyrac's Translation.*

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The FAMA.

Feb. 17th, 1804.

dorf (*a*) and *Pothier* (*b*) go farther. All concur, however, in holding it to be a necessary principle of jurisprudence, that to complete the right of property, *the right to the thing*, and *the possession of the thing* itself, should be united; or, according to the technical expression, borrowed either from the civil law, or as *Barbeyrac* explains it, from the commentators on the Canon Law, that there should be both the *jus in rem*, and the *jus in re*. — This is the general law of property, and applies, I conceive, no less to the right of territory than to other rights. Even in newly discovered countries, where a title is meant to be established, *for the first time*, some act of possession is usually done and proclaimed as a notification of the fact. In transfer, surely, where the former rights of others are to be superseded, and extinguished, it cannot be less necessary that such a change should be indicated by some public

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(*a*) Cela posé, il est clair, que les conventions toutes seules suffisent pour faire passer d'une person à l'autre la proprieté considérée purement & simplement comme une qualité morale, détachée de la possession; mais lorsque l'idée de la proprieté renferme de plus un pouvoir physique, que met en état de faire actuellement usage de ce droit il faut, outre l'accord mutuel, que la chose meme soite délivrée. C'est une suite des maximes naturelles de la raison, & non pas des seuls réglements du droit positif. — *Puff. l.* 4. c. 9. § 8.

(*b*) Quoiquil soit de cette question traitée selon le pur droit naturel, que nous abandonnons à la dispute de l'école, le principe du droit Romain, que le domaine de propriété d'une chose ne peut passer d'une person à une autre, que par une tradition réelle ou feinte de la chose, etant un principe recu dans la Jurisprudence, comme en conviennent ceux, qui sont de l'opinion contraire, nous devons nous y tenir. — *Pothier*, v. 4. *p.* 437.

The FAMA.

Feb. 17th, 1804.

acts, that all who are deeply interested in the event, as the inhabitants of such settlements, may be informed under whose dominion, and under what laws they are to live. This I conceive to be the general propriety of principle on the subject, and no less applicable to cases of territory, than to property of every other description.

It will be only necessary to enquire then, whether the practice has been conformable to what we might conceive to be the true principle of law. On this point no doubt can be entertained. The *Corps Diplomatique* is full of instances of this kind: Where stipulations of Treaties for ceding particular countries are to be carried into execution, solemn instruments of cession are drawn up, and adequate powers are formally given to the persons, by whom the actual delivery is to be made. In modern times, more especially, such a proceeding is become almost a matter of necessity, with regard to the colonial establishments of the states of *Europe* in the new world. The Treaties by which they are affected may not be known to them for months after they are made. Many articles must remain *executory* only, and not executed, till carried into effect; and until that is done by some public act, the former sovereignty must remain. Amongst the instances that might be cited to shew what the practice has been on this subject, I will mention only a few. On the cession of *Nova Scotia* to *France* by Treaty, 21st *July*, 1667; the act of cession, which purports to be made in consequence of the Treaty, was not drawn up till *February* 1668, when full powers were sent out to deliver up the *settlement to*

the

The FAMA.

Feb. 17th, 1804.

the person who should be empowered to take possession, under the great seal of *France.* — Another instance, which comes nearer to the present question, is to be found in the proceedings which took place when this very settlement of *Louisiana* was ceded by *France* to *Spain* in 1762. It passed by act of cession drawn up in solemn form, and dated more than a year after the Treaty itself. Indeed modern history abounds in such instances. If to these it were necessary to add the authority of a judicial recognition of the principle, I think the case of *Wroughton* against *Mann*, to which I alluded on the former day, is strongly in point. That was a case before the delegates on appeal in a revenue *cause.* The Act of Court pleaded, " that *East Florida* was ceded to *Spain* by Treaty of 1803, and that eighteen months were allowed for emigration. 2dly. that notwithstanding the Treaty, the *English* laws continued till the *Spanish* Government arrived and received delivery from General *Tonin;* and the formal instruments, under which possession was afterwards taken, were exhibited." The offence charged was an act of importation contrary to the *British* Revenue Laws, long after the ratification of the Treaty, but before the arrival of the *Spanish* Governor, and the actual delivery. Objections were taken to the allegation, similar to the arguments which have been urged in the present case, viz. " that the country had passed to *Spain* by virtue of the Treaty; that the continuance of *British* possession was but an usurpation; and that the offence was no longer amenable to the *British* laws. If that could have been sustained, the plea must have been bad; but it was not so

The FAMA.

Feb. 17th, 1804.

held. The Court of Delegates were of opinion, that the contract was merely *executory*, and till it was carried into execution, the *British* possession, and the *British* laws," continued in full force. On this ground the allegation was admitted. The cause proceeded, and went off afterwards on failure of proof as to the fact; but the opinion of the Court, as to the law, was fully declared by the admission of such a plea. I am of opinion, therefore, that on all the several grounds of reason or practice, and judicial recognition, until possession was actually taken, the inhabitants of *New Orleans* continued under the former sovereignty of *Spain*. — Then as to the fact of possession. There are undoubtedly some expressions in these letters, which might raise a supposition, that the person who had arrived, had taken possession on the part of the *French* Government. A letter from a *French* Loyalist expresses, " the expectation of *French* troops and a civil officer to take possession, *and make Frenchmen of us, who are now Spaniards.*" It is afterwards said, that citizen *Laussart* had arrived to take possession. A proclamation is issued by him, which is drawn up very much in the present tense; but that mode of speaking is used also, I observe, relative to some circumstances which had certainly not taken place, as " that the military Prefect brings with him troops, &c." when it is certain that not a soldier had appeared. From other parts of the evidence, I think it is sufficiently clear, that he was either not the person who was charged with the act of taking possession, or that some considerations had induced him to defer it. A letter written by him states, " if the taking *possession had passed, &c.*" There is also

The FAMA.

Feb. 17th, 1804.

also the Convention entered into: "That the *French* flag should enjoy the same privileges, *as if the possession had actually* been taken." These passages strongly indicate that the actual delivery had not passed. — Then comes the certificate of the *Spanish* Governor, accompanied by an instrument equally formal, from the *American* Consul. These are, I think, decisive as to the fact. They state, that Citizen *Laussart* had arrived in *March* to make the necessary arrangements, but that no cession had taken place, and that he had never exercised any jurisdiction. On the whole of this evidence I am led to conclude, either that Mr. *Laussart* was not the person authorized (*a*) to take possession, or that the act of cession had from some causes been deferred. In this situation of things, it appears to me, upon the grounds before stated, that the colony must be considered as continuing, at the time of capture, under the dominion of *Spain*, and consequently that these persons, as *Spanish* subjects, are entitled to restitution.

(*a*) It appears from the *American* papers, *Dec.* 13, 1803, that Mr. *Laussart* was the person who *afterwards* took possession; "that a few days previous to that date, the province of *Louisiana* was, with all due ceremonial, surrendered to the *French* Republic. The Governor *Salcedo*, and the Marquis *De Gasa Calvo*, acted as Commissioners on the part of his Catholic Majesty; and the colonial Prefect, Citizen *Laussart*, as the representative of the *French* Government." — From the same authority, *Jan.* 23, 1804, it appears that, 20th *Dec.* 1803, possession was formally ceded by *France* to the *American* Governor with appropriate ceremonies. — The concluding paragraph describes the new establishment to have consisted principally of *Frenchmen*. "The Governor has confirmed the Municipality, which consists of a Mayor, Council, Secretary, and City Treasurer. They are all *Frenchmen*. The same duties are paid as under the old regime."

Feb. 23d, 1804.

FADRELANDET, Hoop.

Joint capture — allegation — objected, that claimant was not in sight at the time of capture, and that it was not averred to have been known to the capturing ship, or to the ship captured, that the claimant was in chace. — Facts necessary to be established, the first by direct evidence, the other by implication.

THIS was a case of *a demand of* joint capture, on the part of the *Camperdown* cutter, against which it was objected, "*that the allegation did not aver the asserted joint captor ever to have been seen by the captured vessel.*"

On the part of the actual captor, the King's Advocate. — This capture was made so long ago as 17th *April*, 1800, and has been the subject of a very long litigation, without any interposition on the part of the asserted joint chaser, till the 5th *August* 1803. This delay must be taken as affording a strong inference against the reality of the claim now set up; even on the mere ground of delay, a question might justly be raised, Whether the actual captor, being suffered to proceed alone, and at a great expence so long, should not be protected against latent claims of this kind, that were never advanced till the main interests of the cause were successfully established. It will, at least, be required that a very clear case should be made out to support the claim, especially as the preparatory examinations make no mention of such a vessel being in sight.—The plea set up is, that the *Earl Spencer* and the *Camperdown* were both lying in *Dover* Roads, when the boatmen brought intelligence of the prize. The *Earl Spencer* sailed first at eight o'clock. The cutter receiving the intelligence afterwards, and learning the course that the *Earl Spencer* had taken, followed at nine. It is alleged, that, at one o'clock, the *Camperdown* saw the *Earl Spencer* and the prize, but

The FADRELANDET. Feb. 23d, 1804.

but it is not averred that the prize saw them, only that the *Earl Spencer* did. A fog came on, and they pursued their course till four o'clock. The capture was made at one, as it is alleged, at the distance of about seven or eight miles from the *Camperdown*, and so near as to be within hearing of the guns. It is alleged that the *Earl Spencer* knew them to be in chase, but not that the prize had any such apprehension, only that they were near enough to hear the guns, and to *have been* seen at the time of the capture, if sight had not been intercepted by a thick fog. It is not averred that they were in sight at the time of capture, nor that the captured vessel knew them to be in chase. One of these facts is essentially necessary; for although a joint chaser may share, though obscured at the time of capture by an accidental fog, such a claim has never been supported, unless when it has appeared that the ship was known by the enemy, as well as by the friend, to be in chase.

On the other side, Laurence.—If the facts of the claim can be well founded, they will not be barred by the objection to the time at which they are brought forward. Notice was given much earlier of an intention to claim, and nothing more can be required. It is by no means necessary that the party should actually interpose in the litigation, inasmuch as he cannot be made a party to the suit, nor is he subject to costs and damages, the whole proceeding being properly the act of the captor. As to the merits of the case, it is admitted, that a ship intercepted by a fog from being in sight, may maintain a title to share. The case turns, therefore, upon the question of joint chasing.—

The

The FADRELANDET. Feb. 23d, 1804.

The Court interrupted the Counsel, observing — All that is now averred in this allegation is, that the persons on board the *Camperdown* saw the prize. That alone will not be sufficient, as it is a principle of law which has been laid down again and again here, and in the Court of Appeal, that a case of joint capture cannot be proved only by witnesses on board the ship claiming.

Laurence. — The situation of the vessels may be proved by the log.

Court. — This allegation is given after a very heavy litigation, in which the interest of prize altogether has been for a long time contested in this Court and in the Court of Appeal. I cannot but think that at this late time the claim comes forward very unfavourably, after very heavy expences have been incurred. It is certainly not necessary for a joint captor to give an appearance throughout the whole of the suit; that would only be to incur additional expence. At the same time, it may be a great hardship on the actual captor, that he should be exposed to the whole burthen of the litigation, whilst the question is in doubt, and that the constructive captor should afterwards come forward to share in the event, without taking any part of the risk. I cannot but think that it would be a fortunate circumstance, if the Court should lay down some rule upon this subject, supposing it competent to do so, that an allegation should not be admissible, unless it is given during the suit, and before the actual captor has fought the whole battle. The constructive captor will still retain considerable advantage

vantage in not being subject to costs and damages; because as the whole act of capture *is the act* of the captor, he is the person that must sustain it. It will be for the further consideration of the Court, whether some such rule may not be consistent with justice, and well suited to the general convenience of all parties. The allegation, as it now stands, cannot be admitted, since it has been repeatedly decided by the highest authority of the superior Court, that a claim of this kind cannot be established on the sole testimony of persons swearing in their own behalf, and that no such claim ought to be admitted. That the *Camperdown* should have *been known* to the *Earl Spencer* to be in chase, would not be a sufficient averment, because it might be *known* only from information. If it can be alleged that the *Camperdown* was *seen* by the *Earl Spencer*, and that she was intercepted only by an accidental fog at the time of capture, it may support the principle, provided that fact is proved by the evidence of persons on board the *Earl Spencer;* for I have already said, that the evidence of persons on board the asserted joint captor alone will not be sufficient. If this fact can be established, it may also establish the fact, that she was seen by the captured vessel, as well as by the actual captor; for I shall certainly require both these facts to be established,—one by direct evidence, the other by implication and necessary inference. If these averments can be made, the allegation may be admitted.

February 28th.—The allegation not having been reformed, the Judge rejected the same.

Mar. 6th, 1804.

LA VIRGINIE, COIGNEAU.

Joint capture.—*Counter allegation* that the claimant had sheered off on a contrary route, under the particular circumstances of the case, rejected.

THIS was a case of joint capture on a counter allegation offered on the part of the actual captor, the *Miranda* stating, that the claimant in joint capture had discontinued the chase, and was standing on a different course at the time of capture.

On the part of the Claimant, the King's Advocate stated—That it appeared in evidence, that the *Minerva* had engaged the enemy at four o'clock in the morning, but having only one gun was beaten off; that she dogged the prize through the whole of the day, and was in sight when the capture was effected in the evening by the *Miranda* appearing under *French* colours. That under these facts, if the schooner did stand aloof at the appearance of the *Miranda*, owing to her being under *French* colours, it could by no means be considered as such discontinuance of the chase, as would defeat the claim of joint capture.

On the other side, Laurence.—The *Minerva* was a small tender, sent out to impress men, and carried one gun only, for the purpose of bringing to *English* merchant vessels. There was no *animus capiendi*, therefore, in her first purpose, nor any commission by which she was authorized to make captures. Under such circumstances, nothing short of actual assistance could be sufficient to establish a claim to share in prize. It is indeed alleged, that the schooner had attempted an engagement in the morning, but she

she was beaten off, and obliged to keep all day out of gun-shot. It is not to be imagined, therefore, that she could be an object of terror to the enemy, or that she could retain a purpose of resuming farther operations against this vessel. The fact is not denied that she was standing aloof at the time of capture; on the other side, *it is* not admitted, *but denied*, that this abandonment of her purpose was owing to the appearance of the *Miranda* under *French* colours.

JUDGMENT.

Sir *W. Scott.*—The question to be determined is, Whether the allegation, if proved, will have the effect of excluding the claim of joint capture brought by the Admiralty, in virtue of the services of this non-commissioned vessel. (*a*) It appears that the schooner had maintained a severe engagement in the morning, and though beaten off, she had hung upon the enemy through the whole day. It cannot be denied, therefore, that there had been at first an *animus capiendi;* and it is, I think, to be inferred from her subsequent conduct, that the contest was not given up on her part, but deferred, until some more propitious opportunity of effecting the capture might offer. Had not this been her intention, she would have taken some other course, instead of continuing, as she did, within sight of the enemy through the whole day. The privateer came up, and, as it is re-

(*a*) The schooner was one of several vessels sent out by men of war in the *Channel* to impress men, though without any authority to entitle them to make prize, for the benefit of their men of war.—*Vide supra Melomane.*

presented

La Virginie. Mar. 6th, 1804.

presented in this *counter allegation*, chased first under *English* colours; and it is asserted, that the schooner *was at that time making off*. It is, I think, highly improbable, that after having hung upon the enemy all day whilst alone, she should have sheered off, on seeing another vessel under *British* colours join in the chase. Under the view which I have taken of the conduct of the schooner, scarcely any evidence would convince me of so improbable an act, as that she had at that time discontinued the chase; or if she at all altered her course, it must, I think, have been owing to the appearance of the *French* colours, which it is admitted, *the Miranda* did at one time assume. The privateer afterwards fired a gun, and hoisted *English* colours; the prize struck, and immediately the schooner came up. All these facts fully persuade me, that she was in reality continuing the chase, and that if there was any falling off, it was only during the time whilst the privateer was under *French* colours, which, though not done with any view of deceit, might produce an alteration of purpose on the part of the tender, owing to the utter impossibility of accomplishing her design under such circumstances. The question being, Whether the facts alleged in this counter-allegation would, if proved, have the effect of excluding the *tender*, or rather the Admiralty in her right, and my opinion being that scarcely any evidence could support the averment, that the tender had sheered off, otherwise than owing to the appearance of the *Miranda* under *French* colours, I am inclined to pronounce that this counter allegation could not have the effect of excluding the claim of joint capture, and that it must be rejected.

THE MERCURIUS, JONASSEN.

Mar. 9th, 1804.

Property of small amount restored without the expence of a formal claim.—Rule framed to the extent of 100*l.* refused to 100 guineas.

FOR the purpose of avoiding disproportionate expences in small claims, the Court had permitted property under the amount of 100*l.* to be restored without the expence of a formal claim.

In this case, Arnold moved the Court to allow the same indulgence to a property estimated only at 100 guineas.

The Court said—That it was necessary to confine this indulgence to some definite amount; that whatever was the sum fixed, there would be always other sums just exceeding that, which might not be distinguishable in principle; at the same time, that it was necessary to adhere to the rule laid down.

Motion refused.

THE JAN FREDERICK, BLOEDORNE.

Mar. 9th, 1804.

Contract in contemplation of war, for the transfer of colonial property, *in transitu*, held illegal.

THIS was a question on the legality of a contract made for colonial produce, *in transitu* 10 *May*, 1803, before the war, but in avowed contemplation of war on the part of the contracting parties.

On the part of the Capture, the King's Advocate and Parsons.—This question relates to a very considerable quantity of colonial produce, in this and in other vessels, shipped as *Dutch* property, on board a *Dutch* ship and bound to *Holland*, but purchased

The Jan Frederick.

Mar. 9th, 1804.

in itinere by M. *Jonassen*, of *Embden*, under a contract of the 10th of *May* 1803. The case has been admitted to farther proof, and it now appears, from the affidavit of Mr. *Jonassen* and the letters exhibited, that the *Dutch* owners first applied to him in *March*, under apprehension of war, to neutralize the property, but that he refused; that they then offered to sell, and he acceded to their proposals, and made this purchase. The contract stipulates that the *Dutch* owners should endorse the bills of lading to the purchaser, on their arrival in *Europe*. It cannot therefore be considered as a complete transfer, so as to charge the title of property. But, independent of that objection, it is a contract that could not be sustained in point of law, inasmuch as it is an established principle, that property cannot be transferred from the enemy *in transitu* in time of war, or in contemplation of war. Exceptions have been allowed in favour of particular transfers made on the eve of hostilities, but only in cases where that event has been wholly unforeseen, and manifestly out of the contemplation of the parties. In this case, on the contrary, the contemplation of war, and the apprehension of capture, is the sole foundation of the whole proceeding. This purpose is admitted and avowed by the parties themselves, through the whole negociation, so that no dispute can arise on the fact. On principle it comes directly under the authority of the *Negotie en Zeevaar the Dankebar Africain*, and that whole class of cases. As to the fairness of such a transaction on the part of the purchaser, he is as much implicated in the unneutral purpose of protecting the property of the

Supra, vol. 1. p. 107.

the enemy from the danger of war, as Mr. *De Coninck* was in the case of the *Rendsborg*, by the same sort of avowal of the main object of the transfer, as passed between the parties in that negociation.

The JAN FREDERICK. *Mar.* 9th, 1804.

On the other side, Arnold and Laurence. — As to the fact of the purchase, it is to be considered undoubtedly as a real and *bonâ fide* transaction on the part of the purchaser, who appears to have been so far from lending himself to defeat the rights of war that he had rejected every proposal of advantage that had been made to him for that purpose. It is also a full and complete transfer in point of law, and in no manner imperfect on account of the engagement to indorse the bills of lading when they arrived. Such an act would naturally be required, as evidence of the property, and more particularly to entitle the parties to receive the goods from the master of the ship; but it can by no means be considered as the substance of the transfer, or as an essential part of the title of the purchaser. If the bills of lading had been by accident destroyed, could it be supposed that no title could have been made? It is rather the undertaking to do further acts to secure a title than an essential part of the contract of sale. As to the other objection that has been urged against it as a transfer *in transitu*, it is to be remembered that the whole of that class of cases relate to transfers in time of war, by which a new state of things is introduced; and though the contemplation of war has been brought into the argument, there is no case extant in which such a transfer having taken place *before hostilities*, and before the character of enemies'

The JAN FREDERICK.

Mar. 9th, 1804.

property, *had attached*, has been pronounced illegal. The contemplation of war, in this case, was a mere mercantile speculation commencing three months before the war broke out, by which the individual chose to give up a part of his property to secure the rest. If such a transaction is to be brought within the range of rules, which are justified only as rules of war, what limits will in future be assigned to the operation of these rules? In the time of profound peace, war is at all times so far a possible event, that it may be supposed to form a part of all mercantile speculations, and yet no one would say, that the legality of such a speculation could on that ground be called in question. The rule of law has hitherto been applied only to transfers in time of war, which introduces a new state of things for a known and definite period. It is the law *for the time of war*. To apply it to antecedent transactions, would be indefinite in extent, and most vexatious to the free speculations of trade. The shipment, the sale, and detention of this property were all prior to the breaking out of hostilities, and therefore this contract cannot fairly be made subject to any such principle.

JUDGMENT.—

Sir *W. Scott*.—This question arises on parts of several cargoes put on board *Dutch* ships in *January* and *February* 1803, and brought in under the general embargo on *Dutch* property, previous to hostilities, in the month of *May*. The property is documented for the account and risk of certain estates in *Surinam*; and certainly, if it was not allowable under any considerations to aver against the evidence of

The JAN FREDERICK. Mar. 9th, 1804.

of the ship's documents, it must be subject to condemnation as *Dutch* property. But the Court has opened a door to such claims, in opposition to the averment of the ship's papers; and it has done this, on a consideration of the fair course of mercantile speculation in time of peace. It has even allowed a change of property *in transitu*, by the (*a*) transfer of the bills of lading, where it had been done without any view of accommodation to relieve the seller from the pressure or prospect of war. In the present instance, there is no proof of any transfer of the bills of lading, except as to one or two parcels of goods belonging to the widow *Noble*, which do indeed bear an endorsement, but whether they were so endorsed before or after the war it does not appear. This alone would be sufficient to defeat the claim; since, till the bill of lading was so endorsed, the contract would, I apprehend, be a thing remaining in covenant only: It might subject the party to an action *damni dati*, but it would not amount to a transfer, being only an engagement that the goods *should be* transferred when they arrived. That a transfer may take place *in transitu*, has, I have already observed, been decided in two or three cases, where there had been no actual war, nor any prospect of war, mixing itself with the transaction of the parties: But in time of war this is prohibited as a vicious contract; being a fraud on Belligerent rights, not only in the particular transaction, but in the great facility which it would necessarily introduce of evading those rights beyond the possibility of detection.

(*a*) In the *Yda* and *Kingma* and other cases.

The Jan Frederick.

Mar. 9th, 1804.

tection. It is a road that, in time of war, must be shut up; for although honest men might be induced to travel it with very innocent intentions, the far greater proportion of those who passed, would use it only for sinister purposes, and with views of fraud on the rights of the Belligerent. This, however, is not a contract made in time of war; and therefore an important question is raised, Whether the *contemplation of war* would have the same effect in vitiating these contracts as actual war? It cannot be said that all engagements in the proximity of war, into which the speculation of war might enter, as for instance, with regard to the price, would therefore be invalid. The contemplation of war is undoubtedly to be taken in a more restricted sense: but if the contemplation of war leads immediately to the transfer, and becomes the foundation of a contract, that would not otherwise be entered into on the part of the seller; and this is known to be so done, in the understanding of the purchaser, though on his part there may be other concurrent motives, as in the case of the *Rendsborg*, such a contract cannot be held good, on the same principle that applies to invalidate a transfer *in transitu* in time of actual war. The motive may indeed be difficult to be proved—but that will be the difficulty of particular cases: Supposing the fact to be established, that it is a sale under an admitted necessity, arising from a certain expectation of war; that it is a sale of goods not in the possession of the seller, and in a state where they could not, during war, be legally transferred, on account of the fraud on Belligerent rights; — I cannot but think that the same fraud is committed against the Belligerent, not indeed as an active Belligerent, but as one

who was, in the clear expectation of both the contracting parties, likely to become a Belligerent, before the arrival of the property, which is made the subject of their agreement. The nature of both contracts is identically the same, being equally to protect the property from capture of war,—not indeed in either case from capture at the present moment when the contract is made, but from the danger of capture, when it was likely to occur. The object is the same in both instances, to afford a guarantee against the same crisis: In other words, both are done for the purpose of eluding a Belligerent right, either present or expected. Both contracts are framed with the same *animo fraudandi*, and are, in my opinion, justly subject to the same rule.

Upon the general ground, also, of guarding against fraud, it appears to me to be equally necessary to apply the same rule to antecedent contracts of this nature. The danger and extent of the mischief to be apprehended is perhaps greater, as it is the only method by which the accumulation of colonial produce could be brought home. It is to be observed, also, that the destination is from the colony to the port of the mother country; in which, with the slightest management, a system of protecting the interests of the enemy might be constructed, which no vigilance could detect. I am of opinion, therefore, that if the papers and letters which have been produced, do sufficiently establish the purpose attributed to the contract,—if it is proved to have been built immediately and fundamentally on the contemplation of war, on the part of the seller, and that it would not otherwise have fallen into the hands of the pur-

The JAN FREDERICK.

Mar. 9th, 1804.

chaser, it is an illegal contract, and must so be held on every ground, on which similar contracts in time of war have been held to be invalid.

It remains then only to consider the evidence of this fact; though perhaps a preliminary question might not unfairly be raised, which would have excluded all other observations; viz. whether in truth this contract was a *bonâ fide* transfer. I shall not think it necessary to go through these papers particularly with that view, farther than to observe, that there are passages which do exhibit to my apprehension strong grounds of suspicion that it was not a *bonâ fide* contract in itself. The claim is given for Mr. *Jonassen* of *Embden*, who is described to be a person of property, though I do not recollect the name in the various transactions of the last war, which have brought to our notice the names of most houses of extensive credit at *Embden*. He seems to have been a sole trader; as he appears, from a circular letter exhibited in the evidence, to have just formed a new partnership after the commencement of this transaction. This large purchase was made, therefore, on his own sole credit. It appears likewise that there is a house of the same name at *Amsterdam*, and that payment was to be made by bills drawn on them. I will not venture to say whether Mr. *Jonassen* had any connection with that house or not, but every body must perceive that such a circumstance would at least afford no inconsiderable facility to cover a transaction of this kind. I observe likewise that this contract stands not only on the sole *commercial credit* of Mr. *Jonassen*, but on his sole credit, also, in point of veracity, since none of his clerks, nor any other persons associated

associated in the transaction, have been examined. Only one person, a notary public at *Amsterdam*, attests, "that *he perceives by Mr.* Green's *copy book* "that *Jonassen*'s letters were actually answered; that "*he inspected* the original bills of exchange, and made "copies of them." Mr. *Jonassen* states in his affidavit, "that he bought the goods for himself and *his partakers*, (though it does not appear who these partakers are, nor whether they might not be trustees "for the house at *Amsterdam*,) *that it was a* bonâ fide "*transaction*, that the bills of exchange were true and "*genuine*, and that the letters were really dispatched, "and were genuine *and original*." The magistrates by whom they are authenticated, *certify*, "that as "they *were exhibited* to them, and bore the post-mark, "they could not *refuse to certify* that they were true "and genuine." This is the whole guarantee that is offered of the actual occurrence of such a transaction, except the production of the letters themselves. I cannot but think that this proof would be very insufficient to entitle the party to restitution. Other persons are stated to be partakers, though it is not shewn who they were, nor whether they were even known to Mr. *Jonassen*. That his affidavit alone should be sufficient to authenticate the whole fairness and reality of this contract, would be too much to maintain.

It is material, however, to observe the manner in which the transaction begins. The King's Message to Parliament of the 8th of *March*, 1803, could not but have produced a considerable sensation on the *Continent*. The first letter that is exhibited is from the owners in *Holland*, of the 25th *March*, and seems to be introduced chiefly for the purpose of shewing, that

The JAN FREDERICK.

Mar. 9th, 1804.

there had been a commercial connection between the parties before, though it was reduced to a very languishing state: To this letter no answer is produced. The first letter of Mr. *Jonassen* is of the 12th of *April*, written in answer to one of the 9th, which was an answer to one of the 1st, written by Mr. *Jonassen*, though that letter is not produced. It is not improbable, that this letter of the 1st, might have thrown some light on the real character of the contract, as containing some observations on the necessary steps to be taken, in conducting such a transaction in that critical situation of affairs; as in Mr. *De Coninck's* case it may be remembered, the first invitation came from him. In the letter of the 9th of *April*, the *Dutch* Owners advert to the uncertain prospect of affairs, and ask, if they can get goods coming from the *Dutch* colonies *neutralized*, by which expression they must I think be understood to point explicitly to a state of war. The answer of Mr. *Jonassen* is material, as it at least shews that the contract took place under an avowed necessity on the part of the *Dutch* owners, arising out of their apprehensions of war. He writes to them in these terms: "Your apprehensions are just, but you must not "flatter yourself that it will be sufficient merely *to* "*neutralize the property*. The *English* have shewn, "during the late war, that they knew how to dis- "cern property neutralized from that which is really "*Prussian*. For my part, I will have nothing to do "with such transactions, nor do I believe, that any "respectable house in *Embden* will be found to en- "gage in them." I hope that this could be no news, that no house of *real dignity* and true credit would engage

engage in such a system of fraud and perjury; though one hardly sees how the credit of the house was of any consequence, since nothing more was wanted, than a mere neutral name to hang to their goods. He goes on: "*I cannot serve you.*" On which, I cannot but observe that they had not proposed it to him; they had merely asked if it could be done at *Embden*. Then comes something which might perhaps, in its references, be not immaterial: "If I can render myself useful to you *in any other* "*manner*, I shall be happy to serve you." Whether any thing had passed before, I am not authorized to say; but it is not improbable that this might relate to some other proposals which he had held out. In the answer to this letter, the persons in *Holland* write: "We have the greatest satisfaction, in finding that "you decline *to neutralize*." I say again, they had never asked him to undertake it; they had only desired to be informed whether it was feazible at his place. Surely such inconsistencies betray strong marks of a correspondence not genuine. The letter goes on — "since *neutralizing* is not possible, could "not the goods be sold at your place after shipment, "*to secure us against a total loss?*" Can there be a more explicit declaration, that the seller was led to enter into this transaction, only as an expedient to save his goods from the danger of war, which he considered as imminent and certain? This letter was written on the 9th of *April*, and was received on the 12th, and on the very day of the receipt does Mr. *Jonassen* take on *himself* this large *contract*, or if there were other partakers, who do not appear, it would not be less extraordinary, that with so short a time

The JAN FREDERICK.

Mar. 9th, 1804.

time for deliberation with them, Mr. *Jonassen* should take on himself the responsibility as the principal at least, and as the only person who appears to have been known to the sellers in this transaction. The next letter is from *Amsterdam*, and mentions advices received of the shipments from *Surinam*. It adverts again to the prospect of public affairs, and says, "As "no reliance can be placed on our underwriters." There was an end of insurance, then, that is obvious; the owners were insured against *sea risk*, but not against the chance of war — against that there was no one to be found who would insure them. They then proceed — "these circumstances alone induce "us to accede to your proposal," and mention is made "that Mrs. *Noble* would be glad to enter into "the same engagement." This letter was received on the 3d of *May*, as it appears from the indorsement. On the very same day Mr. *Jonassen* answers it, professing his willingness to engage in the contract. The next letter from *Amsterdam*, of the 7th of *May*, mentions, that as this is a business which requires dispatch, our partner, Mr. *R*——, will proceed to your place to terminate the business with you. At this time Mr. *R*——, had not set out. On the 10th of *May*, Mr. *Jonassen* writes in answer to the letter of the 7th, giving notice of Mr. *R*——'s arrival, and states that they had already been treating, but had not come to any agreement. On the same day, Mr. *R*—— writes to his partners in *Holland*, "that there was no time to be lost, that Mr. "*Jonassen* was very tenacious;" yet, strange as it will appear, the contract was drawn up in all its forms, bearing date on this very day, when both parties represent

The Jan Frederick. Mar. 9th, 1804.

present themselves to be still treating, but at variance in their terms. I cannot say that all this may not positively have taken place as it is represented, but added to the other features of the case, such an apparent precipitation in the most material part of the negociation does, I think, very considerably heighten the improbability of the transaction. There are many other passages on which similar observations might be made unfavourable to the reality of the contract: There are still more that might be produced to shew the repeated acknowledgment of the parties, that nothing else than an absolute necessity arising from approaching hostilities could have induced the *Dutch* owners to sell, "They are congratulated on *having* "*saved a part of* their property." In short, it would be only to consume time unnecessarily, if I were to particularize all the passages that tend to establish to a demonstration, that the contract was made only as an expedient for avoiding the consequences of war, which both parties considered as inevitable. This is sufficient to support the principle which I have ventured to lay down, that the same rule of law is to be applied to such contracts *in transitu*, made in anticipation of war, as are applied to similar contracts in time of actual hostilities. I have already adverted to some unfavourable observations that might be made, as to the reality of the transaction. On that part of the case it might also be farther observed, that the property was to have gone into the hands of the seller, where the whole agreement might have been rescinded; that this circumstance would very much facilitate the cover of fraud; at the same time that it does, perhaps, throw some degree

The JAN FREDERICK.

Mar. 9th, 1804.

gree of improbability on the transaction, that a foreign merchant should engage in so large a purchase with persons, who were, nevertheless, to take the actual possession of the goods, though he appears to have had but very slender dealings with them before. The letter which opens the transaction is not produced, and there are many other things which might induce me to suspect that it is not a real and genuine transfer. But taking it to be a *bonâ fide* contract, yet being formed *in transitu*, for the purpose of withdrawing the property from capture, it does intimately partake of the nature of those contracts, which have in the repeated decisions of this, and of the Supreme Court, been pronounced null and invalid; and I pronounce this property subject to condemnation.

Mar. 13th, 1804.

JUFFROW CATHARINA, HANSEN.

Licence — for raw materials — Lace not properly included — Favourable considerations arising from the situation of the parties and the circumstance of the orders having been given previous to the war without an opportunity of countermanding. — Restitution.

THIS was a case respecting the due application of a licence, for the importation of certain raw materials from *France*, viz. whether a parcel of lace could be held to come under that description.

JUDGMENT,

Sir *W. Scott.*—This lace was shipped under an order given before hostilities; and it is argued on the part of the captors, that lace is an article which cannot be included under the terms *raw materials*; that no protection can be derived from the licence, and that the original order ought to have been countermanded

The JUFFROW CATHARINA.

Mar. 13th, 1804.

manded at the breaking out of the war. Certainly if a licence is to be deemed necessary, it will be difficult to say that the particular licence alluded to in the present case can avail to the protection of this shipment. But there are some considerations applying to the manner in which this shipment had originated, which may entitle it to more indulgence. It appears that goods were sent out from this country to *Flanders*, and that an order was given at the same time for a return of certain other foreign articles, and among the rest for this lace. It seems, that when an order is given for lace, it is put into a state of preparation, and that more time is required to countermand an order for this article than for others on which less labour and preparation is required: It is a work of long and slow process, in which advances must be made to the manfacturers; and although the demand on that account against the merchant would be suspended during hostilities, it might be difficult to relieve the *British* merchant from the demand, when the foreign correspondent was rehabilitated, and restored to his right of action by the return of peace. It is to be remembered also, that during the present hostilities there has been a more than ordinary difficulty in carrying on any correspondence with the enemy's countries — a circumstance for which the Court has in other cases thought it not unreasonable to make some allowance. It does not appear that the party had an opportunity of countermanding; and although it would have been more satisfactory, and a more guarded proceeding on the part of the *British* merchant, to have applied for a licence for the special importation

The JUFFROW CATHARINA.

Mar. 18th, 1804.

importation of this article under the circumstances of his case, there are sufficient considerations to induce the Court to think favourably of this claim. There seems to have been no intention to dissemble: it was owing to the erroneous conception of the enemy's shipper, that this article was put on board to take the benefit of a licence that had been procured for other articles in this vessel. It is therefore in this point of view distinguishable from Mr. *Hankey*'s case, in which the shipment was made here, where the party had still the dominion over the goods, and the power to stop them from proceeding. Here the dominion was in the enemy's shipper, under a discretion reposed in him by orders before the war, and which the importer is not shewn to have had any opportunity of countermanding. I wish it to be understood, that by this decree the necessity of obtaining a licence, is not in any degree relaxed. On the contrary, this Court cannot sufficiently inculcate the duty of applying, in all cases, for the protection of a licence, where property is to be withdrawn from the country of the enemy: it is indeed the only safe way in which parties can proceed. Without meaning in the least to weaken the force of this obligation, I think the claim, under the particular circumstances of this case, is justly entitled to the favorable considerations which I have thrown out, and I shall direct this property to be restored.

THE WILHELMSBERG, LUBBEN.

Mar. 16th, 1804.

Convenient port, under the Prize Act, how considered, as to the liberty of captors to choose the ports to which they bring vessels for adjudication.

THIS was a question of costs and damages, owing to the neglect of the captor not bringing the vessel into what could be reasonably termed a *convenient port*, under the Prize Act.

JUDGMENT.

Sir *W. Scott.*—This ship was seized on a voyage from *Amsterdam* to *Archangel*, under a suspicion, I presume, of *Dutch* property. She was going in ballast to bring a cargo to *Amsterdam*, and appears to have been very much in the habit of *Dutch* trade, particularly during the war. On these and other grounds, it could not be fairly denied that there were circumstances to justify the seizure: but the second act of sending the vessel to such a place as *Shetland*, is not so defensible. The Prize Act undoubtedly gives the captor some latitude on this subject: he is directed generally "*to send his prize to some convenient port.*" *Shetland* cannot, I think, be considered in any manner *as such a port.* It is a place where the captor cannot get advice; much less can the claimant learn in what manner to proceed, or where to resort for justice. The captor is certainly not justified under the Prize Act to select *any* port that he pleases. It must be a *convenient* port, and in that consideration the convenience of the claimant, in proceeding to adjudication, is among one of the first things to which the attention of the captor ought to be addressed. If the vessel had been sent, in the first instance, to *Leith*, or *Berwick*, or to any of

The Wilhelmsberg.

Mar. 16th, 1804.

of the principal northern ports of this kingdom, the consequences that have arisen in this case could not have ensued. The papers were brought in on the 2d of *August*, but nothing more was done till the 16th.—In the mean time, the vessel was removed to *Leith*, and on the 23d of *August* an offer was made to release. Surely it cannot be maintained, that no damage had accrued at this time, when the offer was made. The master swears, that he could not obtain his papers, and that it was too late in the year to prosecute his voyage to *Archangel*. The offer it seems was rejected, on this account, and because there was no reservation of costs and damages, which might, very prudently, and in most cases very safely be made. I cannot think that the neutral master acted in any manner improperly, in declining such an offer, being only told, to go about his business, and that he would hear no more of the matter. To release a vessel in this summary manner, without her consent, after she was once brought in, would be contrary to the directions of the Prize Act. Upon the whole, considering that the Court is called upon to beat down and discourage the notion that captors may carry their prize wherever they please, and that the injury sustained in this case has proceeded entirely from that mistake, I shall allow one month's demurrage, and the expences of the present hearing.

THE DRIVER, CASHMAN.

April 17 & 25th, 1804.

THIS was one of the *Cape Nicola Mole* cases, and now came on upon objection taken to the report of the Registrar and Merchants, viz. that in estimating costs and damages, they had allowed interest upon interest.

Registrar's report *confirmed as to interest upon interest* on an account settled by the report of the registrar and merchants two years before.—Expences of poundage in cases of costs and damages not chargeable to the claimants.

The Registrar said — That they did not usually allow interest upon interest, but that the ground of the present report was, that the account had been made up two years ago, and that from that time they had allowed interest.

JUDGMENT.

Sir *W. Scott.*—This is one of that unfortunate class of cases from *Cape Nicola Mole*, in which this Court has felt itself under the necessity of decreeing restitution with costs and damages. The report of the Registrar and Merchants was made, and if not objected to, it was to be taken as confirmed. No objection *has been taken*, and therefore it must stand confirmed. Some short time is, I presume, usually allowed for payment; but here the matter has been suspended for a considerable time, owing, as I am informed, to an appeal that was entered on the part of the captor. The usual rule undoubtedly is not to give interest on interest, but when interest has been given, and the account is made up, the interest then becomes principal, on which it is not unreasonable that farther interest may be decreed, similar to what is done in the Court of Chancery. Some time is to be allowed for the convenience of payment: for that, and for the confirmation of the Registrar's

The Hulda). Supra. vol. 3. p. 235. and other cases.

The Driver.

April 17 & 25th, 1804.

report, I shall allow a deduction of two months, and confirm the report as to interest given from two months after the report was brought in by the Registrar. (*a*)

THE BRIG LOUIS.

April 20th, 1804.

Prize agents subject to the order of the Prize Court for interest of money detained in their hands.

THIS was one of the *Cape Nicola Mole* cases, in which a motion was made on the part of Messrs. *Willis* and *Waterhouse*, as agents of the captor, that they might be dismissed, on a statement that they had given a bill for the amount of the money in their hands, and that the bills had been paid.

Contra Laurence prayed—That the Court would decree them to pay interest, and the costs of the proceeding.

Swabey, in reply.—The captors may be liable to interest, but how far their agents can be held liable in this Court, is a question now depending in prohibition (*b*) before the Court of King's Bench, on an

(*a*) In this case, on a former day, (13th *March* 1804,) the Registrar had asked by whom the expence of poundage was to be borne, whether by the claimant or the captor under a decree of costs and damages? *Court.*—I think a party having a decree for costs and damages, is to be protected against the expence of poundage. An express decree of costs and damages, must go to every thing in the way of compensation. So in other cases, that are not cases of costs and damages, but where the captors are the persons suing out the commission, the poundage is paid by them.

(*b*) In the case alluded to (the *Polly*, *Davis*), the Court of Appeal had made a decree of interest against the agents. On prohibition brought in the Court of King's Bench, That Court held, that the

an order to that effect made on these parties in the Court of Appeal. It is prayed therefore that this question may stand over.

The Baid Louis.

April 20th, 1804.

Court. — It will be understood that, if the Court before which the prohibition is depending, shall hold that agents are properly liable to interest, under the decree of the Prize Court, I shall hold that liability to attach on *Willis* and *Waterhouse* in the present case. It would be the greatest hardship on the captors, to throw the demand for interest on them, when the agents have all the time had the use of the money, merely because it has happened that the monition was first *taken out against the captors.* (*a*) As to the expences, they have been incurred principally by the indulgence that has been shewn to these agents, for the accommodation of their affairs, and they must fall on them.

THE URANIA, WALKER.

May 1st, 1804.

Allegation pleading affidavits, in a case of joint capture by plea and proof, rejected.

THIS was a case, on the admission of an allegation of joint re-capture, on the part of the King's ship, pleading the affidavits of some *French* sailors who were on board the recaptured ship. The recapture was made by a non-commissioned vessel, and proceedings were first instituted on the part of

the jurisdiction of the Prize Court exercised over the Proceeds and over the agents, who had been in possession of those proceeds, was well founded. *Willis against the Commissioners of Appeal in Prize Causes, Easter Term,* 1804. *East. Rep.*

(*a*) In the case of the *Polly*, the first decree of the Lords of Appeal for interest was against the captors.

The URANIA. May 1st, 1804.

the Admiralty, *as for droits* of Admiralty, but were discontinued. The *Loyal Briton* afterwards appeared demanding salvage in her own right.

In support of the allegation, the King's Advocate and Arnold.—The first point, which appears one of considerable importance, is whether the non-commissioned vessel has any *persona standi* before the Court. In the case of an original capture, she could not maintain an interest in prize. In recapture also, which partakes intimately of the nature of prize, the same principle seems equally to bar *the* non-commissioned person from maintaining a suit for salvage; and, it is presumed, that no instance can be produced, in which such an interest has been pronounced for.

Court.—Surely a distinction has been always held in cases of salvage. There must be many cases in which the claims of non-commissioned persons have been allowed for salvage, on retaking property out of the hands of the enemy. The words of the Prize Act (*a*), appear to me clearly to recognise such a practice; which direct salvage to be paid on recapture *by his Majesty's ships of war, or any privateer, or other ship or vessel or boat under his Majesty's protection and obedience.*—Objection over-ruled.

(a) Sect. 39.

The King's Advocate.—A second question turns upon the form of proceeding. The claim for salvage was first instituted on the part of the Admiralty by affidavits, and at that time the joint captor prepared himself in the same way, by taking the affidavits which are now offered. The Proctor of the Admiralty declined

declined to proceed farther; and the non-commissioned captors have commenced a suit, on their own behalf, by plea and proof. To this the joint captor has nothing to oppose but these affidavits, as the *French* crew have all left the kingdom. Whilst the cause was first proceeding in the form of affidavits, the joint captors were justified in relying on these affidavits, as sufficient evidence. It is hoped therefore that the Court will, under the particular circumstances of the case, think them still admissible, and allow them to be pleaded in this allegation.

The URANIA. May 1st, 1804.

On the other side, Laurence.—Whilst it was uncertain whether some part of the cargo might not be Droits of Admiralty, the Proctor of the Admiralty gave an appearance, and took one or two affidavits, but soon declared that he proceeded no farther. We are called upon to propound our interest, and in doing that, are in no manner bound by the mode in which the Proctor for the Admiralty had proceeded. The cause must go on in the regular way. These voluntary affidavits cannot be received.

JUDGMENT.

Sir *W. Scott.*—There is a fact pleaded in this allegation, which, if I understand it rightly, may be very material. It is stated, "that when the *Glenmore* took possession, there was no *British* seaman on board, *except the first and second mate of the* Loyal Briton, *who delivered the papers to the officers of the* Glenmore, *with an intimation that the* British *Registrar was on board the* Loyal Briton." If that is a true representation, there could be no want of evidence; as these mates might be examined. With regard to the nature

May 1st, 1804.

THE ZACHEMAN, KRAEPLIEN.

Swedish Treaty. — Detention of a Swedish ship brought in subject to the right of pre-emption of a cargo of tar. — Three weeks detention allowed, and directed to be paid by Government.

THIS was a case on the detention of a *Swedish* ship, with a cargo of iron and 1200 barrels of tar, taken on a voyage from a *Swedish* port to *Rochefort*.

The King's Advocate stated — That the ship had been offered to be restored; that the cargo being tar, consigned to a port of the enemy, had been detained for pre-emption; but that the offer was at last declined on the part of Government.

On the part of the Claimant, Laurence stated — That the vessel had been taken so long ago as *March*; that compensation was due for the detention under the second and third articles of the late convention with *Sweden*.

In reply, the King's Advocate and Robinson.—The captor in this case has done nothing but what was perfectly justifiable. To detain and send in a cargo of tar, bound to such a port as *Rochefort*, was an act of duty, which he was not at liberty to omit. The very Treaty (*a*) referred to, seems to indemnify the captor in this instance, by the distinctions made in the second and third articles, between cargoes of this kind bound to neutral ports, and those going to the port of the enemy. In the former case it is provided, "that if a cargo bound to a neutral port is "brought in, on suspicion of a destination to the "port of an enemy, and it afterwards appears that "the destination was actually to the neutral port, she "shall be restored with compensation," &c. that is,

(*a*) 25th *July*, 1803.

as

as against the captor. In the next article, the case of such cargoes bound to the port of the enemy, is provided for. It is there considered as a case of *pre-emption*, in the exercise of which, *the bringing in* must be justified as a preparatory step, and if any delay takes place, it is obviously not to be imputed to the captor, who is by that very article of the Convention virtually authorized to bring in such a cargo.

JUDGMENT,

Sir *W. Scott.* — I have no hesitation in pronouncing that the seizure in this case was perfectly justifiable. In the case of a ship carrying such a cargo as tar to one of the great naval arsenals of the enemy, it was not improper to bring in for enquiry as to the fact of property, whether it was going on the private account of the neutral merchant, or under a contract with the Government, by which those arsenals are more usually supplied. The captor had therefore a perfect right to have the formal papers verified. In bringing in, and taking the depositions, the captors were in my opinion perfectly justifiable. That being done, the effect of this evidence ought to have induced them to consent to restitution.—Then comes the question of pre-emption. In the Convention lately entered into, this Country has been induced to waive its former right of forfeiture, for that of pre-emption, which *Sweden* has admitted, and I think in terms which do warrant the construction put upon them, in argument, that they justify the bringing in. As to the exercise of the right of pre-emption, if particular orders from Government are necessary, I apprehend, that there is some mode in which those orders can

The ZACHERIAH. May 1st, 1804.

can be expeditiously obtained. The terms of the Treaty seem to relate principally to the time taken in unlivery; but if the ship is detained as a warehouse, under any uncertainty as to the intention of Government, the equity of the Treaty will, I think, extend also to such detention. The ship was brought in on the 20th of *March*, the claim was given on the 27th, and on the 31st, the offer of restitution was made. Since that time, there seems to have been some delay. In the present case, which is perhaps the first that has arisen under the Treaty, and one of not the most favourable complexion, I should be unwilling to press these considerations to the utmost: but I wish it to be understood that cases of this description must be conducted with great tenderness to the neutral interest, and that as little time as possible must be lost in deliberation. Some demurrage must be allowed, but not against the captors in this case. I shall allow three weeks demurrage to be paid by His Majesty's Government; and I wish that the Admiralty may be apprized, that under the Treaty which now exists, matters of this kind must not be kept subject to long negociation, since it is not less expedient for the purposes of justice, than for the interests of all parties concerned, that a prompt answer should be returned, as to the disposition of Government to avail itself of the right of pre-emption.

THE SISTERS.

(Instance Court.)

May 12th, 1804.

Case of possession — Legal title still remaining in Charnock, in the possession of the bill of sale, supported in opposition to an *asserted* equitable interest in others.

THIS was a case (*a*) of possession, brought by Mr. *Charnock* against *Tubbs*, the asserted owner in possession, under a transfer from *Marsden* and Company, for whom it was suggested that *Charnock* had made the original purchase.

On the part of Mr. Charnock, the King's Advocate. — Several transfers are asserted to have taken place with regard to this ship. In the first instance, Mr. *Charnock* was the undoubted purchaser, under a sale by the Marshal of this Court. He paid the purchase money, and obtained a bill of sale, which establishes the legal title in him, unless it can be shewn to have afterwards passed from him by any legal transfer. The plea set up on the other side is, that *Charnock* made this purchase as agent for *Kirkpatrick*, and actually delivered possession to him; that *Kirkpatrick* afterwards sold to *Marsden*, and *Marsden* to *Tubbs* the defendant in this suit. The parties are many of them become bankrupts, and the whole of these subsequent transfers seem to have passed by accommodation bills, and merely to give this vessel the colourable character of an *American* vessel, to enable her to engage in some course of trade, in which she could not legally be employed as an *English* vessel. The case on behalf of Mr. *Charnock* is, that he is the holder of the legal title

(*a*) Supra, vol. 4. p. 275.

in

The Sisters.

May 12th, 1804.

in the bill of sale; that in sending the vessel to *Kirkpatrick* at *Liverpool*, he meant to transfer her only provisionally, in case the purchase money should be repaid; that he detained the bill of sale, to await this contingency; that condition never having been fulfilled, nor the transfer completed, by executing a bill of sale to *Kirkpatrick*, the legal title is still in *Charnock*, he is entitled to be put into possession of his vessel by the decree of this Court.

On the other side, Arnold and Laurence. — This is a cause of possession, in which the Court will look to the right of possession, having no jurisdiction over the question of property. It will not disturb a quiet possession without a clear title is made out on the other side; still less will it do this, where the person now claiming to be put into possession was the very person who gave possession to him, who now holds it; and where the bill of sale was retained only from a suggestion of general convenience put forward by himself. The equitable title has undoubtedly passed from *Charnock*, and the only question is, Whether, after a voluntary agreement on his part to sell, accompanied with delivery to the agent of *Kirkpatrick* he can now set aside the whole of that transaction, and demand the aid of the Court, to give back the possession to him, after other contracts have been engrafted on that equitable title, which *Kirkpatrick* the purchaser under the first sale had acquired from him. The Statute Law of this kingdom directs that the transfer of *British* ships should pass between *British* subjects, by certain formal instruments. But that is to be regarded as a strictness, arising from the peculiar policy of the

The SISTERS.

May 19th, 1804.

the navigation system of this country. This was an *American* bottom, and it is by no means clear that the strict rule of our Statute Law would attach upon it. In countries where a bill of sale might not be necessary, the legal title could not be outstanding in opposition to the equitable title that has passed under this transaction. But independent of that circumstance the Court is not bound to lend its aid, to dispossess a party who appears, upon the face of the transaction, to have been invested with his equitable title, by the very person now setting up a claim against him. A great part of the purchase money was actually paid specifically on account of this purchase; but now, because *Kirkpatrick* is become a bankrupt, and it suits the purposes of *Charnock* better to make his claim to the ship, than to come in as a general creditor under the commission, it is pretended that that payment was made to the general account. There has been not only a distinct *agreement to sell, but also a specific payment, and delivery to Tubbs*, with intimation from *Kirkpatrick* at the time, that he had agreed to sell the ship to *Marsden*, and that *Tubbs* would come to take possession of the ship for the purposes of that sale. *Tubbs* accordingly came, and received delivery of the vessel, without any intimation from *Charnock* that *he* had any right in the vessel, it being merely stated, that it would be more convenient not to give up the bill of sale, for fear of vacating a policy of insurance that had been made upon her. This being the state of the facts, the Court will not think it necessary to interfere, but will leave the parties to their remedy in other Courts where the whole question of property may be brought into discussion.

In

The Stepney.

May 12th, 1804.

In reply, the King's Advocate.—In a transaction of this kind, no transfer by parol agreement could avail to confer a legal title. But in this case it does not appear that any absolute agreement was made; nor any delivery of such a nature, as is contended for on the other side. On the 23d of *August*, *Charnock* complains of the amount of the advances made to *Kirkpatrick*'s account, and on the 30th of *August*, it appears that *Kirkpatrick* considered the ship as *Charnock*'s security, since he wrote "that he could "not transfer her, till *Charnock* had transferred to "him." *Kirkpatrick* contracts for a sale to *Marsden*, and *Charnock* permitted the vessel to go round to *Liverpool*, that he might obtain payment of the purchase money. But the sale to *Marsden* never actually took place, and the money never was in reality refunded to *Charnock*. Here is therefore no absolute agreement even by parol, nor any absolute delivery, if those acts alone could avail.

JUDGMENT.

Sir *W. Scott*.—This question arises on the arrest of a ship, which had been sold under the authority of this Court to Mr. *Charnock*. He is in possession of the bill of sale, and this Court is called upon to maintain a title acquired under its own proceedings. Whether *Charnock* purchased as a trustee for another, or under what private understanding, it will be unnecessary to enquire. The legal interest, which is established before the Court, on his part, excludes all considerations of other equitable titles, which, if they exist, must be left to be enforced in other Courts. Much correspondence has been introduced, and if it was fit for me to enter into it, I should see

The Sisters.

May 12th, 1804.

that *Charnock* was employed to buy this vessel for a Mr. *Kirkpatrick*, when the accounts should be closed between them; but till that money was repaid, *Charnock* was to continue the *equitable* owner, as he certainly was the *legal* proprietor under the bill of sale that had been executed to him. It has been contended in argument, that the effect of the bill of sale alone would not be material, because this was a foreign ship (*a*), in respect to which it might not be requisite that it should pass by a bill of sale. It is said, that the agreement to be found in these letters, and the actual delivery under it, would be sufficient to establish the equitable title; and a reference has been made, on this subject, to some opinions at common law, which are said to have been given in favour of such a title. The opinions of gentlemen at that bar must undoubtedly be entitled to entire respect on a question of Municipal Law: But this is a question of a more general nature, arising out of a system of more general law—out of the universal maritime law, which constitutes a part of the professional learning of this Court and its Practicers. According to the ideas which I have always entertained on this question, a bill of sale is the proper title to which the Maritime Courts of all countries would look. It is the universal instrument of transfer of ships in the usage of all maritime countries; and in no degree a peculiar title deed or conveyance known only to the law of *England*: It is what the Maritime Law expects, what the Court of Admiralty would in its ordinary practice always require, and what the Legislature of this country has now made absolutely necessary, with regard to *British* subjects, by the regulations of the Statute Law. As to the fact

(*a*) An *American* bottom, sold under a decree of Court, in a cause of bottomree, 21st *July*, 1800.

The Sisters.

May 12th, 1804.

fact of such an agreement, what is there in this correspondence that can amount to a precise and particular declaration from *Charnock, that he has transferred.*—There are expressions which intimate that he purchased under an intention to transfer, when the account should be settled; but that there was any specific *declaration of having transferred*, is what the Court has not been able to find in this correspondence. Then as to the delivery, it is said that *Charnock* delivered to a person sent by *Kirkpatrick* to take possession for the purpose of proceeding to a second sale. It may be so, but it was not a delivery of the title of property—he retains the legal title in his own possession, and gives up the vessel only as the more convenient method of carrying the general intentions respecting her into effect. The expressions of *Charnock*'s letters fairly interpreted, imply that he considered the property to be still in him, till after her arrival at *Liverpool*. If *Kirkpatrick* had intended to purchase of *Charnock*, for the purpose of selling to another, why did he not get a bill of sale executed from *Charnock*, which was the first step to be taken? Nothing of the kind is attempted, but *Charnock* is left in possession of the only legal title, without any assignment. The ship is afterwards turned over in some way or other to *Marsden*, and from him to *Tubbs*, who is represented to have been the person employed by *Kirkpatrick* to receive delivery from *Charnock*. But whilst *Charnock* was left in possession of the bill of sale, such a delivery as is here said to have taken place, could not be a delivery of the title to the property. It was merely putting the property into the hands of another, for the purpose of executing a particular contract,

contract, but which contract was, in fact, never executed. Nothing less than an express declaration made by *Charnock* to *Tubbs*, "I deliver this *to you* "*for the use of Marsden,*" could fairly raise the argument,—how far delivery, coupled with the correspondence, could be held equivalent to a bill of sale. Here is nothing of the kind. Bound down as this Court is to decide on the legal title, without taking notice of equitable claims, I have no hesitation in decreeing the necessary monition in this case, to put *Charnock* into the possession of this vessel.

The Sisters.

May 12th, 1804.

THE VROW ANNA CATHARINA, Mahts.

May 15th, 1804.

Contract of certain neutral merchants for *Batavian* produce, to *be brought to* Amsterdam, *and there sold,* by the *East India* Company, before the war, pronounced not invalid.

THIS was a case respecting considerable parcels of *Batavian* produce, captured on a voyage to *Holland*, but claimed on behalf of merchants of *Embden*, under a sub-contract with *Voute* and Co. of *Amsterdam*, who had purchased of the *Dutch East India* Company, under particular conditions and limitations *noticed in the case.*

On the part of the Captors, Arnold and Swabey, contended, in substance, that the transfer itself was not complete, but if it were, that the circumstances under which this property was taken, were sufficient to impress upon it the *Dutch* character. That, in this respect, the case was similar in principle to other cases, to the *Dutch* fishing vessels (*a*), and to the *Spanish* register ships (*b*), in which it had been established, that a character different from that of the neutral proprietor, may attach on a particular course of commerce,

(*a*) 1 Adm. Rep. p. 1.
(*b*) In the war of 1739, infra, p. 167.

The VROW ANNA CATHARINA.

May 15th, 1804.

commerce, or on a particular transaction, by its intimate connection with the commercial system of the other country—and in some of the Register ships (*a*), that it was not necessary to produce this effect, that the transaction should arise wholly in time of war. The present case was however founded on a contract made after preliminaries indeed, but not in time of peace nor without a prospect of the renewal of hostilities. The property was documented as *Dutch property*, having been purchased free of duties, and being, in its destination, to become subservient to *Dutch* interests throughout the whole transaction. It was to be consigned to the original sellers, the *Dutch East India* Company; it was to be deposited in their warehouses, and sold at their sales. If the proceeds were to be remitted to the asserted foreign purchasers, it was not as an absolute sale, so much as in the nature of a return on *respondentia* for money advanced to relieve the distresses of the *Dutch* Company, and for bearing the risk *in transitu*. That it was impossible to find any feature of an independent title to the thing itself, in such a contract; that at all events the *Dutch* character must be held to attach upon it.

(*a*) *Marquis d' Antin*, Lords, 5th *June* 1748, in the claim of *English* Merchants for proceeds of goods sent to *Spain* for the *Spanish West India* trade *before the War*.

On the part of the Claimants, the King's Advocate and Laurence, contended that the national character of the proprietor was the ordinary test by which moveable property was characterized. That this was the general rule, not yet narrowed by any limitations that could include the present case. That all considerations arising from an unneutral interference *in time* of war were to be put out of the question, as this contract was formed before the present war, and wholly

The VROW ANNA CATHARINA.

May 15th, 1804.

wholly in contemplation of peace. That the case of the *Ospray* (*a*) in which *American* merchants obtained a restitution of their shares of a *French* whaling voyage, entered *before the war*; the case of *Hasum* and *Ernst* (*b*), and the cases of the *Swiss* proprietors who obtained restitution of cargoes from *Curaçoa*, documented as *Dutch*, were instances of the general rule. That the case of the *Dutch* fishing vessels stood on the particular ground of being designed evidently to defeat the rights of war. That the cases of the *Spanish* register ships stood in part on a principle at that time more strictly enforced, that in no case could the proprietor be permitted to aver against the solemn documents of the ship's papers; and secondly, in no slight degree, on the particular nature of that trade, of which it was a fundamental principle that the property should belong to *Spanish* merchants, and that that fact should be verified under the sanction of an oath. That the interference of foreigners was prohibited by the policy of the *Spanish* Government, but that no such prohibition could be shewn in this case; on the contrary it was certified by the *Dutch* Company, that they had been in treaty with foreigners but that the negociation had broken off. As to the particular circumstances of the case, it was contended in substance, that they were not such as could impeach the right of property, or fix upon it the national character of *Holland*.

(*a*) Supra, p. 6.
(*b*) Supra, vol. 1. p. 14.

JUDGMENT.

Sir *W. Scott*.—These are cases of great extent as to value, but not so as to the number of questions involved in them: for the facts are not contested, and the whole inquiry that results out of a very large

The Vrow Anna Catharina.

May 15th, 1804.

mass of papers turns upon two questions of law. The general fact out of which these questions arise, is a contract of sale from the *Dutch Asiatic* Company of a quantity of goods lying at *Batavia* to certain persons in *Holland*, who have contracted to undersell to certain other persons resident in foreign countries, who are the claimants and asserted proprietors. To entitle them to receive restitution, it must appear that they *are* proprietors, and secondly, that they *are qualified proprietors*; that is, that they are persons who are not disabled by any circumstances belonging to this transaction, from receiving restitution of their property in this Court. These are the two questions. In order to determine upon them, the nature of the original contract, between the *Dutch Asiatic* Company, and the first purchasers, must be first considered. That contract appears to have been entered into on the 24th of *March*, 1802, between *Voute* and Co. acting for themselves and divers other merchants of the commercial cities of *Holland*. These parties are considered as actual proprietors, and are so described throughout. Under this contract "they are to provide ships, and send them to *Bata-*"*via*. They are there to receive the goods, and to "pay the price — one third in *Europe*, one third on "delivery at *Batavia*, and the remaining third on "the return to *Holland*, where the goods were to be "deposited in the warehouses of the Company, and "sold by the Company, under the usual conditions "of their sales." The first question that has been raised, is, whether These Persons are to be considered as proprietors? But on what ground is it asserted that they are not? Is it to be objected, that they had not paid the whole purchase money? That is an objection

The VROW ANNA CATHARINA.

May 15th, 1804.

objection which every day's habits of considering such subjects will not support; two thirds had actually been paid, and the remaining third was to be received, according to the contract, on the arrival of the goods in *Europe;* that is a sufficient legal payment. It is next contended that there was no delivery! How does that stand in point of fact? The goods had actually been delivered to their agents, and were coming *for their account and risque.* It is true that they are, by the contract, to be delivered to the *Asiatic* Company; but upon what authority? by the contract of the party that it shall be so. In what capacity are the Company to act in their sales? in the capacity of agents. It is not a delivery to the Company, that the Company may do what they please with the goods. They are bound to sell them upon the terms prescribed, and to pay over the proceeds. Does this deprive the owner of the dominion over his goods, so as to destroy his right of property? If I, having goods, hand them over to another to sell, the circumstance of the man's having been the original proprietor of the goods would make no difference. He had conveyed his right of property, and it would be no derogation of those rights, that by the terms of the purchase he was to have the management of the sale. There would be no foundation for the assertion that the goods themselves were not completely delivered, merely because they reverted to their former proprietor in a new character. His possession, as agent, is my possession. In the present case, it is hardly necessary to observe, that at the time of capture the goods were in the possession of the purchasers: they had not yet reverted. The obligation to revert, founded on a mere voluntary compact, would not defeat that

The Vrow Anna Catharina.

May 15th, 1804.

immediate possession, if personal possession could be held necessary to support the right of property; but it is by no means necessary: Suppose the case of the *East India* Company holding a delegated and confided possession of goods in this country, for the purpose of bringing them to their regular sales! Could it be said of such goods, that the contract under which they may have been acquired by the proprietor, subject to this condition, was a contract for the profits only, and not for the goods themselves? Is it necessary that there should be a manual possession by the hands of the purchaser himself? Is there not a legal delivery, an implied delivery, a presumed delivery, through the hands of the agent? This is the ordinary mode of effecting the *traditio*; and whether it is given to the same person accepting the office of agent, or to a third person accepting it, still it does not interfere with the *emptio* and *venditio*. In these first purchasers, then, there was a clear right of property; and if they, not being restricted from conveying it by contract, transfer it to others capable of receiving it, it will equally be property in them: for what more stands in the way of their *rights* of property? If *Voute* had all the rights of property; and the want of payment, and the want of delivery, is no objection against *him*, neither will it be an objection against *them*, if he has transferred to them all those rights, having a legal faculty so to do. If the right of the second purchasers is called in question, it must be said, either that the first purchasers were incapable of selling with effect, or that these second purchasers were incapable of buying with effect. As to any limitation upon the power of transferring, the contract appears to contain no such condition. *Voute* contracts,

tracts, in the first instance, for his own house and for other *Dutchmen;* that is the first class of contractors, with whom alone the Company negociate. But there is no express negative to an under-sale to others of any description whatever. There is no limitation to the power of assignment. It does not at all follow, by any just implication, that the contract of assignment between the *first* and *second purchasers* is not good, merely because it might not be obligatory between the original sellers and the second purchasers. The second purchasers may not have a right to come immediately upon the first sellers, and yet the assignment to them be perfectly valid, as far as the title to property is considered here. There are many cases too obvious to mention, in which the property is divested out of the first seller; yet the remedy of the second purchaser is not direct against him, but against the intermediate person from whom he purchases. It is so in all cases where the original title of property is not concerned. A man, having the clear title to property, has a right to say, I will sell to you only: I have nothing to do with your subsequent transfers: I am answerable to you only for the delivery of the goods under your contract. The title of the second purchasers, therefore, may be perfectly good, at the same time that they could not sue the Company immediately for any part that they were to act in this transaction. Indeed, the whole second branch of the argument proceeds upon this foundation, that the subsequent contract is good, to the extent of making the purchasers *Dutchmen.* For this is the second objection, that although the persons may have become proprietors, they are not *qualified proprietors* to obtain restitution, because they are, under the circum-

The Vrow Anna Catharina.

May 15th. 1804.

stances of this transaction, liable to be considered and treated as *Dutchmen*. It cannot be doubted, indeed, that there are transactions so radically and fundamentally national, as to impress the national character, independent of peace or war, and the local residence of the parties. The produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation, as a holder of the soil, and is to be taken as a part of that country, in that particular transaction, independent of his own personal residence and occupation. So the flag and pass of a nation, taken up in war or peace, binds the vessel almost without exception. So in the case of a strict exclusive colonial trade from the colony to the mother country, where the trade is limited to native subjects, by the fundamental regulations of the state, and the national character is required to be established by oath, as in the case of the (*a*) *Spanish* Register Ships. There whoever asserts himself to be the proprietor, by the solemn averments of an oath, takes the fortunes of the community as to that property. These are all cases independent of times of peace or war, though generally it cannot be denied, that the circumstance of peace or war, or the contemplation of those events, will form a very material distinction in the considerations by which the national character

(*a*) *Spanish* Register Cases, before the Lords, were, The *Pierre Joseph*, 1744. The *Santa Rosa*, *Le Bartz*, 3d *Dec.* 1743. The *Dauphin of France*, 28th *June*, 1744. *L'Agatta*, 1749. The *Hoffnung*, *June*, 1754.

of

The Frow Anna Catharina.

May 13th, 1804.

of the transaction is to be judged. It has been so generally held up, that definitions are dangerous, that I will not presume to lay down the tests by which it is to be distinguished in all cases, whether the transaction is radically, and in its own nature, a national transaction in the judgment of this Court. But I may say this, that a much greater latitude is allowed in peace than in war, and for this plain reason, because there are no rights of a third party concerned: there is no fraud to be guarded against. When war comes, it is necessary to shut up some of the avenues of commerce, because otherwise the belligerent rights could not be protected. Those avenues, in time of peace, are perfectly open, as commodious to the parties, and incommodious to nobody else; for all other parties are friends, and as such interested in their prosperity. A greater latitude therefore may, on these considerations, be expected to prevail in time of peace, and is in practice allowed. It becomes material to consider, then, at what time this transaction took place? The contract(*a*) begun under the prospect of peace, supported by the preliminaries. The ratification had not, at that time, been signed, but it *had taken place* before the undertaking quitted *Europe*. What would have been the case, if war had again intervened before the sailing of the ships from *Europe*, it may be difficult to say. It seems probable, that the contract would have been rescinded; for such a conjecture is warranted by the twenty-first article, which stipulates, "that if *Batavia* should be in possession of the enemy, the contract should be void." The letters express sanguine expectations of returning peace. One letter speaks of "*warlike appearances, but as meant to accelerate the peace.*" Another

(*a*) Contract 24th *March*, Definitive Treaty, 27th *March*, 1802.

The Vrow Anna Catharina.

May 18th, 1804.

letter says, "If peace is not concluded, still the contract will not be disadvantageous." Peace was not concluded, indeed, at the first commencement of this speculation, but the public appearances were such, that there seemed to be no reason to fear that any inconvenience would ensue from setting the transaction on foot before the ratification was signed; and it is always to be remembered, that the contract might be altered, if war took place unexpectedly before. Upon the whole of the evidence on this point, it is, I think, clear that the parties had no such thing as a state of war in probable contemplation. As far as the effect of contemplation goes, then, it is favourable to the parties. No person can say, that there was any design to evade belligerent rights: it was indeed to relieve a pressure proceeding from a former war, but without any view of sheltering the property from capture. If the transaction is to be impeached, therefore, it must be on the ground that it is one of those transactions, which have such a national bottom and substance, that, without consideration of peace or war, they are exclusively and radically and fundamentally a national transaction; and in which the man who engages in them, assumes, *pro hac vice*, the character of that nation. — Several circumstances approximate it to a *Dutch* transaction; for, unquestionably, there is a great deal of *Dutch* agency, and even of *Dutch* interest throughout; but is it so essentially *Dutch*, that a foreign character cannot be predicated of it? What are the circumstances to which such an effect can be attributed? Certainly not the mere purchasing of goods at *Batavia* out of the Company's stores, for that we have seen done in a variety of cases, without necessarily affecting the character

The Vrow Anna Catharina. May 18th, 1804.

character of the foreign purchaser. That this is done by a contract with the Company in *Europe*, will not invalidate. That the contract engages, that the purchased articles shall come to *Europe* in *Dutch* vessels, will not invalidate. That is a collateral matter of agreement, on the part of the Company, looking to another object, independent of the character of the merchandise to be conveyed. The duties to be paid, may be considered as involved in the price for greater simplicity and convenience. Suppose foreign merchants of any other state in *Europe* had agreed to this full extent, with the *Dutch East India* Company, I do not see that they would have departed from their own proper character in this feature of the transaction. It must be found then in some circumstances beyond this; and there are two to which such an effect is ascribed. One is, that the Company totally excluded all foreigners from this adventure, so that no man could be avowed to have any interest in it but a *Dutchman:* The other circumstance is, that this property was to be brought to *Holland*, there to be placed under the management of the Company in the sale and disposal. With respect to the first, it is certainly true, that the Company deals only with *Voute* and other *Dutch* houses; and if I found the prohibition alluded to, I think I should be bound to consider the *Dutch* character as inherent, and this transaction as *Dutch* throughout. But, on this point, I must observe, first, that there is no such prohibition to be found in the contract: secondly, that all probability is against it: and thirdly, that it is proved that there was no such intention. The Company, themselves, certify this to be the fact, "that they never meant to exclude

The Vrow Anna Catharina.

May 15th, 1804.

exclude foreigners from any derivative interests in this adventure; that they had actually negociated with foreigners in the first instance; but that the negociation had broken off only on the terms of the price." It is, besides, observable, that the whole transaction of this sub-contract is carried on with the greatest unreserve and publicity. The documents were to continue *Dutch* between the Company and the first purchasers, because the Company resolved to look to no other, and not to be remitted to foreign countries for payment. To them it is *Dutch property*, for the purpose of *Dutch* responsibility; that purpose served, they look no further: and unless, it can be maintained, that he who is for particular reasons proprietor as to one person, is, on that account, to be deemed the real proprietor to all persons whatever, it cannot be said that the real interest of property may not reside elsewhere; and *that it may so reside*, without being liable to be considered as *Dutch* by any person but those who stipulated, that, for the security of their own interests, it should be liable to be so considered *by them*, I am of opinion, therefore, that though the Company have a right to consider it as *Dutch*, looking no farther than to the first *Dutchman*, with whom they contracted, it does not necessarily follow, that those who admit that it has been actually transferred to foreigners, have nevertheless a right to consider it as *Dutch*. The other ground is, "That it was under "an absolute agreement to return to *Holland*, to be "under the disposal and management of the Com- "pany." The fact itself is not demonstrated to the degree that would be required to support the conclusion; for the twenty-first article provides for the-

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The VROW ANNA CATHARINA.

May 13th, 1804.

contingency of its going elsewhere; and the penalty is not such as can be said to amount to an absolute prohibition. But if the fact were so, in what way does it convert the interest, supposing that, independent of that circumstance, the interest would be found elsewhere. It is mere consignment and agency, upon a bargain between the parties, and the whole effect is limited to that agency and consignment. I do not see that it is more than one of those possible modifications of a commercial bargain, which may take place in time of peace without giving a third party, who has no interest in it whatever, a right to consider it as a transaction so exclusively confined, as to affect the national character of the parties engaged in it. Upon this view of the question, taking it to be a contract formed in what I consider as a time of peace, and in contemplation of peace, without any view to relieve a belligerent from the pressure of his enemy, which would give that enemy a right to counteract a purpose so directly hostile and mischievous to himself, by the application of a stricter rule of judgment, (and upon this admitted circumstance, that there is no infraction of third rights, I lay great stress,) I am of opinion that it is a contract which foreigners had a right to make, at such a time, without departing from their foreign character. The contracting parties have divided the possible advantages of such a transaction between them, so that many of the interest belong undoubtedly to the *Dutch*; but the interests of property belong, I think, to the foreigners. In a state of peaceful commerce they have a right so to divide them; and I shall restore those interests of property to the neutral claimant, but subject to the costs of the inquiry, which

THE VROW ANNA CATHARINA.

May 15th, 1804.

which has become absolutely necessary, from the complicated nature of the transaction, and the ostensible *Dutch* character under which this property was sailing.

Dec. 19th, 1804.

THE ELSEBE, MAAS. (a)

The power of the Crown to direct the release of property seized as prize, before adjudication and against the will of the captors, is not taken away by any grant of prize conferred in the Order of Council, the Proclamation, or the Prize Act.

THIS was a case of considerable importance and delicacy, arising on an order of Government for the release of several vessels, being part of the second *Swedish* Convoy, under particular circumstances.

The question made on the part of the Captors was, whether the Crown had such a power, or rather whether a right and interest in the thing taken did not vest in the Captor at the time of seizure, under the grant of prize made to Captors by the Order of Council, the Proclamation, and the Prize Act, in such a manner as to entitle the Captor to proceed to adjudication, notwithstanding an order of release on the part of Government.

The question was fully argued by the *King's Advocate* and *Robinson* on the part of the Crown, by *Laurence* and *Swabey* on the part of the Claimant, and by *Arnold* and *Burnaby* for the Captor. The material topics of argument are taken up and discussed so fully in the judgment, as to render it as unnecessary, as it would also be peculiarly difficult to give an adequate and succinct statement of the argument in this Report.

(a) This case is reported out of the order of its date as a case of public importance, and as arising out of the transactions of the last war.

JUDG-

JUDGMENT.

The ELSEBE.

Dec. 19th, 1804.

Sir *W. Scott.* — This question, which has been very elaborately argued, arises on several *Swedish* ships with their Cargoes, belonging to subjects of other Countries and Cities, taken under the convoy of a *Swedish* man of war, and proceeded against on that ground. Several points have been made on behalf of the owners of the ships and cargoes, one applying to the ships as well as to the cargoes, and two that are peculiar to the cargoes. With respect *to them* it is first contended, that they belong not to *Swedes*, but to subjects of the *Hans Towns*, and that they are not involved in the penalties of *Swedish* resistance, which was an act of the *Swedish* government, and will not bind the subjects of other powers; that the proprietors of the cargoes were not privy to this fact, and that the masters of the vessels were not the agents of the cargoes, so as to bind them. This is contended on the same principle that has been adopted by the Court, in some blockade cases, where ships, sailing originally in ignorance of the war, and having been warned in their voyage, have nevertheless persisted obstinately in their original destination to the blockaded port. I am of opinion that this defence cannot be set up with effect, since in the only Charter-party which has been produced, and which must be taken as produced by the claimants as representatives of the rest, there is an express stipulation *that the ship should proceed under Convoy*. But I will take the case on a supposition that there was no such engagement. The master associates himself with a convoy, the instructions of which he must be supposed to know; he puts the goods under unlawful protection, and it must be presumed that this is done with due authority from the owners,

The Elsass. Dec. 19th, 1804.

owners, and for their benefit. It is not the case of an unforeseen emergency, happening to the ship at sea, where the fact itself proves the owners to be ignorant and innocent, and where the Court has held, that being proved innocent by the very circumstances of the case, they shall not be bound by the mere principle of law which imposes on the employer a responsibility for the acts of his agent. On the contrary, it is a matter done *antecedently* to the voyage, and must therefore be presumed to be done on communication with the owners and with their consent; and the effect of this presumption is such that it cannot be permitted to be averred against; inasmuch as all the evidence must come from the suspected parties themselves, without affording a possibility of meeting it, however prepared. The Court has therefore thought it not unreasonable to apply the strict principle of law, in a case not entitled to any favour, and holds, as it does in blockade cases of that description, that the master must be taken to be the authorized agent of the cargo, that he has acted under powers from his employer, and that, if he has exceeded his authority, it is barratry, for which he is personally answerable, and for which the owner must look to him for indemnification. I pass over many considerations which have been properly pressed in argument; but I cannot omit to observe that this is not merely a question arising on a single act of limited consequence; it is a pretension of infinite importance, and of great extent, being nothing less than an opposition to the general law of search, by which, if it could in one instance be admitted, the whole provisions of the Law of Nations on that head might be effectually defied; for

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if this principle could be maintained, by an interchange of convoys the whole unlawful business might be carried on with security. To put the goods of one Country on board the ships of another, would be a complete recipe for the safety of the goods, with a trifling alteration, easily understood, and easily practised, whilst the mischief itself would exist in full force.

Secondly it is contended that no grant of prize made by the Crown attaches upon such property as this, because the grant is of *property of the king's enemies*, that is of the *French* and other nations with whom we are at war. But the grant is not so construed and applied. — It is held in construction and practice to embrace all property liable to be condemned as prize, and not particularly reserved by the rights of the Crown or of the Admiralty. By *fiction*, or rather by *intendment* of law, all property condemned *is the property of enemies*, that is, of *persons so to be considered in the particular transaction*; and half the business of this Court is exercised on such property, in determining whether it is not liable to be condemned as prize to the captors. It is therefore a position not seriously to be maintained, that the captors grant does not reach to this extent, by the constant course of interpretation authorizing such a construction.

These two points being disposed of, which are confined to the cargoes, another of much greater extent, as comprehending both ships and cargoes, and of still greater importance, is suggested to arise upon the facts of this case. As it was a point, on which the rights of the Crown were directly involved, I felt it to be my indispensable duty to call on those

The Elsebe. — Dec. 19th, 1804.

who are specially entrusted with the defence of the interests of the Crown, to assert and vindicate those rights, unless it was the intention either to disclaim them entirely, or at least to waive the exercise of them on the present occasion. When the rights of the Crown were brought forward by the claimant, in a way which it was impossible not to notice, the Court was bound, as every court would be, to take care that justice was done to them. The Rights of the Crown are public Rights, conferred not merely for private purposes, or for personal splendour, but for the public service, and to answer the great exigencies of public interest, and claims of public justice; as such, they demand the active protection of every Court, in which the occurrence of them is suggested to arise. The right which is asserted by the claimant, and is denied on the part of the captor, is that of releasing ships and goods that had been taken *jure belli*, before adjudication and *without the consent* of *the captors*. I say *without consent*, because I think I must hold, upon the present evidence, that the captors have not done any act, by which they can be considered as communicating their consent.

Before such a question can with propriety be introduced, it must appear that the Crown has actually exercised the power, and that the party has not renounced the benefit of it. For, if the Crown has not exercised it, or if the party has renounced the benefit, the Court would, for obvious reasons, decline to entertain a question of this high nature, without an actual necessity calling for the discussion, and would be glad to dismiss it from farther consideration. That the Crown has exercised the power in this instance, is I think sufficiently proved,

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by the solemn evidence of an official letter from the Secretary of State for the foreign department, to the Minister of that Country whose subjects were principally interested in the question, informing him *that the ships were released, and that orders were given by the Lords of the Admiralty for that purpose.* This I apprehend is the regular mode of communication with the ministers of foreign powers; and it must be presumed, that what is so communicated, unless disavowed, is the act of the State. It proceeds from those who are the organs of the State towards foreign powers and their representatives, and what they say, binds the State unless disavowed. That the order was conveyed immediately through the Admiralty, is no objection surely to the validity of the act: The conveyance of the orders is merely the subordinate and instrumental part of the business; and I take the Admiralty to be the proper channel through which the order for release should be transmitted to the captors. But even if there had been some little irregularity in the mode of transmitting such an order, an irregularity such as may and must sometimes occur in the shifting exigencies of the public service, it could in no degree have been considered, as vitiating the substance and effect of the thing. Whether the communication had been made by this or that hand signifies nothing; whether it was in writing or in words signifies nothing; the question is, whether it was so directed by the proper authority of the State: had it the seal and impress of that original authority? Through what course that direction travelled, whether by one post or the other, is a matter of small moment, and perfectly immaterial, provided the fact is clear that it proceeded from the State. It is not suggested that the

The Elsass.

Dec. 19th, 1804.

Admiralty did not issue the orders. They are averred to have been procured by the Secretary of State, and are not at this moment disavowed, or in any manner receded from on the part of Government, after the call which the Court has made on the officers of the crown, for the purpose of knowing in what light they are to be considered. I am bound, I think, to hold the order that has been called in question, to have proceeded from sufficient authority, and to stand at this moment unrevoked.

The next ground that has been taken is, that the party had not accepted the release; and if this had been shewn, it would, I think have been sufficient to defeat the effect of the order. It would undoubtedly have been competent to the claimant to have said, "the restitution is defective, I will not accept it, "but will go to the Courts of Justice to obtain a "more ample compensation." Without imputing to the Crown an injustice, which is not to be imagined, it cannot be conceived that the party would have been denied his resort to a Court of Justice, which sits principally to enforce the rights arising from the Law of Nations. If he had appealed from the Government to the Court of legal redress, the Court must have received the complaint, and have proceeded to an ultimate determination on the quantum of the grievance alleged; and by such a conduct the party might fairly have been considered to have waived the benefit of a partial release. But I find nothing of the kind: The letter which the claimant wrote on the occasion has been very properly described to be written in most respectful terms: It is a letter of grateful acceptance, appealing only to the equitable consideration of Government, for some farther compensation on grounds therein

The Essex. Dec. 19th, 1804.

therein stated; but it contains no appeal to the Court, no declining of the offer made by Government. On the contrary, it is rather to be taken as a total relinquishment of all legal remedy, as a statement of their case in a style of political negociation merely, and containing nothing that can with any propriety be deemed a waiver of the release then offered. Something has been said of the lapse of time that had intervened, before the papers were brought to the notice of the Court. It has been great; but I cannot blot out of my remembrance, the important transactions to which this matter has, at least in some degree, given birth. Many years of negociation—I am sorry to add, some months of actual hostility, passed, before this question was happily adjusted by a convention. During that period nothing was done in this Court. When the general question was settled prospectively between the parties, the question came forward with respect to the fleet of which these vessels composed a part. Whilst the question respecting the whole fleet was under discussion, these ships had a right to stand on the general ground of defence, as long as it might possibly be determined in their favour: they might feel it their duty so to do, in order that they might not prejudice the rights of the other ships associated with them. Having so done, and failed, they have now a right to resort to the benefit of the order which applied to them exclusively, and to call upon the officers of the Crown either to admit and avow these papers, or to contradict and renounce them. On this part of the case, I feel myself bound to say that the order is sufficiently authenticated; that the Crown does not disavow it; and that I must consider the case as subject to the

The Elsass. Dec. 19th, 1804.

effect of the Order, whatever that may legally be, for the release of this property.

The facts then being completely established, the question of right arises, how far the Crown can release at any time before adjudication, without consent of the captors. It is an important question connected with most momentous consequences: No reflecting man can approach it, without feeling that he has to weigh a matter of extreme delicacy, though perhaps not of equal difficulty. Be the delicacy or the difficulty what it may, however, it will be the duty of the Court to meet with firmness any exigencies, which the administration of justice may impose upon it.

It is admitted on the part of the captors, whose interests have been argued with great force, (and not the less effective surely for the extreme decorum with which that force has been tempered,) that their claim rests wholly on the Order of Council, the Proclamation, and the Prize Act. It is not (as it cannot be) denied, that, independent of these instruments, the whole subject matter is in the hands of the Crown, as well in point of interest as in point of authority. Prize is altogether a Creature of the Crown. No man has, or can have, any interest but what he takes as the mere gift of the Crown. Beyond the extent of that gift he has nothing. This is the principle of law on the subject, and founded on the wisest reasons. The right of making war and peace is exclusively in the Crown: The acquisitions of war belong to the Crown: and the disposal of these acquisitions may be of the utmost importance for the purposes both of War and Peace. This is no peculiar doctrine of our constitution; it is universally received as a necessary principle of public jurisprudence by all writers on the subject, *Bello parta cedunt reipublicæ.* It is

The Elsass. Dec. 19th, 1804.

not to be supposed that this wise attribute of sovereignty is conferred without reason; it is given for the purpose assigned, that the power to whom it belongs to decide on peace or war, may use it in the most beneficial manner for the purposes of both. A general presumption arising from these considerations is, that Government does not mean to divest itself of this universal attribute of sovereignty, conferred for such purposes, unless it is so clearly and unequivocally expressed. In conjunction with this universal presumption, must be taken also the wise policy of our own peculiar law, which interprets the grants of the Crown in this respect by other rules, than those which are applied in the construction of the grants of individuals. Against an individual it is presumed, that he meant to convey a benefit with the utmost liberality that his words will bear. It is indifferent to the public in which person an interest remains, whether in the grantor or the taker. With regard to the grant of the sovereign it is far otherwise. It is not held by the sovereign himself as private property; and no alienation shall be presumed, except that which is clearly and indisputably expressed.

With these rules of interpretation the title deeds of the captors must be considered, to determine whether the Crown has in these deeds renounced that power, which in principle it possesses, and in practice has frequently exercised. If there is any thing which can be supposed to produce that effect, it must be the conveyance of a right of some species or other to other persons, and these can be no other than the captors, in virtue of which they claim an indefeasible interest in prize once taken. The right contended for is a right *to seize and bring to adjudication* all ships of the Enemy. Does the right *to seize*, thus

The Elsass. Dec. 19th, 1804.

generally given, alone bind the Crown, so as to bar it from any further exercise of its power with respect to seizures? Certainly not; for after that right is given *to seize all ships* of the enemy, the Crown can exempt as it sees fit. The Crown, which declares general hostilities, can limit their operation: It can except individuals: It grants particular passes: It exempts particular classes of the enemy's ships, notwithstanding *the right* thus given *of seizing all ships*. If, then, the right of seizing all ships thus generally given, does not bind the Crown, in its power of qualifying that right by subsequent modifications; on what ground is it contended, that the exercise of its power, with respect to proceeding to adjudication, is barred by the mere act of seizure? The mere act of seizure surely cannot work any such effect: it is an act in itself in some degree always dubious till adjudication, and possibly erroneous; yet this dubious act is to convey to the party a right indefeasible *to proceed to adjudication*, when the very proceeding may be a further wrong done, an aggravation of costs and damages already occasioned by the improper seizure! I attended with great impatience to the able argument of Dr. *Arnold*, to learn what was the specific nature of the right conferred on the captors by the act of seizure, to which the effect of barring the power of the Crown to release is to be attributed. It is admitted to be, in *degree*, an *imperfect right*; *In species* it was stated, if I understand the argument, to be a *jus persequendi*, a right of action, and no more; no right of interest, but a *mere right of bringing to adjudication*. *Whatever* is the nature of this right, it is conveyed only in the Order of Council, it is not given in the Proclamation or the Prize Act. It is indeed recited in both, as a thing otherwise existing,

isting, but it makes no part of the powers conferred in either of those instruments. Now, according to the construction which is in my opinion to be put upon this matter, this *jus persequendi*, as it is called, is *not a right* conveyed, *but a duty enjoined*. Captors have generally a right to seize, subject to this duty of bringing to adjudication—a duty enjoined, that they may not make seizures, without bringing the ships and goods seized to the notice of the proper Tribunal, in order to prevent the right of seizure from degenerating into piratical rapine. If the Crown imposes that obligation, the Crown can release it. Supposing the Proclamation and Prize Act to be out of the way, and that the matter stood singly upon the Order of Council, there can be no doubt that the Crown could so release. The Crown imposed the obligation, and so far as the Order of Council alone is considered, the Crown retains the whole interest. If the Prize is condemned, it must be condemned to the Crown, and for its interest, for the Order of Council gives no interest to Captors. No doubt could exist, supposing the matter to stand on the Order of Council alone, that the Crown is completely *dominus litis*, and also *dominus rei litigatæ*, supposing there is no claim maintainable on the part of any neutral proprietor.

As far as any right to the extent contended for can be supposed to be vested in the Captor, then, it must be attributed to some enlargement of these rights given by the Order of Council, derived from the Prize Act and Proclamation. Let us consider what this enlargement is. The Proclamation gives the whole property, but *not till after adjudication:* until that time, no beneficial interest attaches. So the Prize Act in like terms gives *the whole interest or property,*

The Elizas.

Dec. 19th, 1804.

(a) *Lecras* v. *Hughes.*

an act of authority would be very frequent. I cannot but think, however, that an expression which is reported to have fallen from Lord *Mansfield*, in a case (*a*) relating to the insurable interest of Captors, (of which case I have been favored with a note from a Noble Person, who was himself of counsel in the cause,) namely, "*that the Crown does not interfere;*" must have been founded in some error of the *fact*. Such instances will appear less numerous, because the fact, that they have been so released, is not necessarily, nor very distinctly, entered in the books. All that appears is, that the Proctor, then proceeding for the Crown, as he must do, declares that he proceeds no farther; on which the Court issues an order of restitution, as a matter of course, and of necessity; for what party can interpose, and pray a condemnation to the Crown, when the Crown has declared that it prays no such a thing, but consents to the restitution. I take this therefore to be the first case, in which the effect of such a consent on the part of the Crown has been called in question. I do not mean to intimate that it has been in any degree improper to take the opinion of the Court upon this question, more particularly in the very decorous manner in which the application has been urged. But I must say, that when it is alleged, that all former cases have passed by consent, the fact itself, that the power was not questioned in these cases, affords a strong proof that the power was considered as *unquestionable*; and I must add, that though I have suffered a party to stand before the Court, for the purpose of arguing the question, I do not know the party who can legally stand before it, praying a condemnation to the Crown, which the Crown itself publicly renounces.

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The Elsebe.

Dec. 19th, 1804.

It will not be necessary for me to travel over instances (*a*); they have been cited in the argument; but I will appeal to the judgment of every person of any experience in these Courts, whether a doubt ever existed on the subject in any man's mind, till it was excited by, I will not say, a *dictum*, but by an interrogatory or question of a Noble and Reverend Person * in the argument upon the *St. Jago*. It will not be supposed that I mean to treat the memory of that eminent Person with the slightest disrespect, when I say that it was an unexamined and unweighed *dictum* in that particular case, and, upon a subject, not generally familiar to his most excellent understanding. I cannot think that *He himself* would have regarded such an hasty excursion of his mind, as that which he would deliberately have followed, if he had been called upon to apply himself to the serious discussion of such a point. To this *dictum*, be its authority what it may, I must oppose *that* of his Predecessor, to which I have already adverted, "*that the crown does not interfere*," because it would be nugatory to speak *of not interfering*, if the right was altogether denied to exist. *As to the practice of this Court*, it has undoubtedly not been guided by the opinion intimated in that *dictum* of Lord *Kenyon*. On the contrary, the same measure has been adopted in the cases cited in argument, the *Johannes*, the *Freya*, and the *Havre* cases; in all which the Court conceived itself to be doing no more than its duty in obeying the order for

* Lord *Kenyon*.

(*a*) Modern instances cited, as subsequent to the regular grant of the whole benefit of prize to the captor by act of parliament in 1708, were, the *Freya*, (*b*) the leading case of a *Danish* convoy brought in, but restored by negociation with government; the *St. Johannes*, one of the first *Swedish* (*c*) convoy, released by the captor under an order from the Lords of the Admiralty; the *Edwin*, (*d*) an *American* vessel which had sailed for the port

(*b*) 29th *July* 1800.

(*c*) 1798.

(*d*) *November* 1801.

The ELSABE.

Dec. 19th, 1804.

for release. It is true that the captors did not oppose in those instances; but I have already stated the grounds, on which I conceive that they could not have been heard by the Court, in an effectual support of any such opposition. There is besides one class of cases, from which we may I think infer, that such a power must be supposed to exist in the Crown; I mean cases (*a*) of restisution at the close of a war. It is a frequent practice to stipulate in the Preliminary articles of Peace, for a cessation of hostilities at certain times, in different latitudes, and for the Restitution of property taken afterwards; and this as well within, as beyond, the period assigned for the Ratification of the Preliminary Articles themselves. The same provision is afterwards inserted in the definitive Treaty. In matters of

(a) *Adolphus Frederick*, captured 2d *May*, 1748, Proclamation 5th *May*, announcing the cessation of hostilities in the channel from 12 days after the 19th *April* 1748, being the date of the signature of the preliminary articles of the peace of *Aix la Chapelle* — restored by decree of court 17th *May* 1748.

port of *Havre* with other *American* ships, in 1801, under some misunderstanding as to the blockade of *Havre*, and was released in consequence of a letter of 24th *Nov.* 1801, from Lord *Hawkesbury*, directed to the King's Advocate, "stating the special circumstances which had led to an ignorance of the blockade on the part of the *Americans*, and expressing his Majesty's pleasure that all the rights and interests which may belong to him in such captured vessels and cargoes, shall be given up and released."

More ancient instances, prior to the Prize Act of 1708, were an order of council 1705, for the release of certain *Dutch* ships seized and brought in, for trading with the common enemy. 4th *Admiralty Reports*, page 254, *Note*. The *Salvador*, 31 *Aug.* 1704, on which there was an order of council addressed to her Majesty's Advocate, for the release of certain *Swedish* ships which had been captured under a *Swedish* convoy, after a contest between the *Swedish* man of war and Admiral *Whetstone*. 15th *Aug.* 1689, an Order of Council for the release of certain *Danish* ships. 23d *Sept.* 1609, an Order for the release of certain *Portuguese* ships. 27th *July* 1589, an Order of Council communicated to the Court of Admiralty for its direction in proceeding against the ships and contraband cargoes of the *Hans Towns*, going to *Spain*, and seized by Queen *Elisabeth*. *Collectanea Maritima*, p. 163. *Note*.

treaty,

treaty, it is true, the act of ratification may be said to operate with retrospective effect, to confirm the terms of the treaty from the date of the Preliminary Articles. But it is not easy to conceive a power lodged in the Prerogative of the Crown, to secure that retrospective effect, to the *conclusion* of a Treaty, without supposing also a corresponding power over the acts of its own subjects, to supersede the intermediate events of war, and to annul captures, *rightly made*, up to the moment of ratification, under the only known rule of action, then promulged, and communicated to cruizers, for the government of their conduct.

Something has been said of the hardship, which captors may sustain, if they are to be held liable to costs and damages, and are at the same time denied the power of proceeding to adjudication; and to be sure nothing could be more unjust, than to leave the captor at the mercy of the claimant for costs and damages, by tak ng from him the power of justifying the seizure. But to this objection, I think, two answers may be given, either of which removes the possibility of such injustice, even if the fact could be supposed (which cannot be supposed without the most extravagant indecency) that the Crown in the transaction had left its officer totally unprotected. First, that after acceptance of such an extrajudicial release, the claimant would no longer be competent to proceed against the captor; the act of acceptance would be considered as a waiver of his judicial remedy, as a total release on the one side and on the other; and if the captor was to appear under protest, alleging that the claimant had accepted such an extrajudicial release, I cannot but think that the Court would pronounce the protest to be

The Elsebe. Dec. 19th, 1804.

be well founded, and dismiss him from any farther responsibility; or *secondly*, if the Court *did not* overrule the protest, it surely would not deny the captor his right to proceed, not indeed for the adjudication of any prize interest under the seizure, but for all purposes of justification.

To considerations of public policy, upon such a question, I decline to advert at any length, for two reasons; one is, because my judgment must be formed on grounds of another species — on the legal construction of the Order of Council, the Proclamation, and the Act of Parliament. If those have in fact taken away the right of the Crown, against the public interest, be the consequences ever so mischievous, the remedy must be sought not in erroneous judgments here, but in wise legislative provisions elsewhere. Another reason is, that the considerations of public policy are too vast, and too obvious, not to present themselves to every man's imagination. When I state the position contended for on the part of the captors to be in effect this, that it shall be in the power of every man who has made a capture, of the pettiest commander of the pettiest privateer, to force on, in spite of all the prudence of the Crown opposed to such an attempt, the discussion and decision of the most delicate questions — the discussion and decision of which, may involve the Country in the most ruinous hostilities, I state a proposition, that must awaken the apprehension of every man who hears me, as to the extent of the danger which would attend the establishment of such a principle. It has been stated, and truly stated, that great encouragement is due to the navy of this kingdom; I feel this I hope in its full extent; and I can have no doubt that it is still more sensibly felt by

The ELSEBE.

Dec. 19th, 1804.

by the Government of this Country; but I must presume, that, in estimating duly the weight of that consideration in any particular cases, the Government will likewise estimate the weight of other public considerations, which in those particular cases may happen to be still more urgent, and more important, high and important as that consideration unquestionably is.

On the whole case, I am of opinion that all principles of law, all forms of law, all considerations of public policy, concur to support the right of release prior to adjudication, which I must pronounce to be still inherent in the Crown. It is with peculiar satisfaction of mind that I reflect, that if I have erred in forming this opinion, the law has provided more ways than one in which the effect of the infirmity of my judgment may be repaired, to the relief of the parties who feel themselves aggrieved by it.

LA GLOIRE, LIMOUSEN.

Dec. 2d, 1803, and *July* 14th 1804.

Cartel — Privileges of, allowed to a ship employed in carrying from *Martinique* to *France*, certain French prisoners taken at *St. Lucie*, agreeable to the understanding of the commanding officer of the *British* Forces at *St. Lucie*, though not strictly provided with the formal documents of Cartel, &c.

THIS was a case of a *French* ship, captured on a voyage from *Martinique* to *France* and claimed by the master as *a cartel* ship, as sailing under the passport of the *British* commander at *St. Lucie*, for the purpose of carrying General *Noques* and other officers taken at *St. Lucie* to *France*.

On the part of the captors, Laurence and Robinson. — On the effect of such protection as this is assumed to be, there can be but one opinion, when the ordinary mode of conducting a transaction of this kind is simply pursued, and established in proof before the Court. The delicacy of cases of cartel is felt by all; but the high good faith to be expected in such contracts

La Gloire.

Dec. 2d, 1803, and July 14th, 1804.

tracts will be most effectually secured, by preserving the simplicity of the contract itself, and by allowing no latitude of interpretation, beyond the obvious meaning of the Grantor. Safe conducts are described by writers on the law of nations, as proceeding entirely from the will of the Grantor. In all doubtful cases, they are to be restricted to the obvious meaning of that will, and are not to be extended to include more than was obviously intended*, and necessary to carry that intention into effect. What are the facts of this case? It is endeavoured to bring within the sanctity of cartel a valuable ship, which has none of the ordinary characteristics of a cartel ship belonging to her. She was a merchant vessel, which had carried out troops from *France*, and appears to have been lying at *Martinique* unemployed, and without hope of getting home in safety to a *French* port. In this situation a charter-party is made between the Officer of Government at *Martinique* and the *master*, in which the vessel is taken up *as a cartel ship*, as she is there denominated, and is chartered to carry to *France*, with a flag of truce, General *Noques*, and about fifty other persons, who had been made prisoners of war at the surrender of *St. Lucie*. The whole of this pretension rests on the gratuitous assumption of *French* parties. There is no passport from the *British* Admiral, nor a word respecting her, in all that passed between General *Noques* and the *British* Commander at *St. Lucie*. In former discussions, on a similar subject, the Court had occasion to observe (a), "that it is not the employment alone that is held to convey a necessary protection, but that the security is derived from the *special safe conduct*, which would be unnecessary, if the mere service were sufficient." The special character

* *Vattel*, b. 3. ch. 17.

(a) The *Daffjis*. 3 Adm. Rep. p. 143.

racter should, in all cases where an opportunity offers, more properly proceed from the act of some person in authority, on the part of the nation against which the protection is assumed. As to the *service* in this instance, it is not a *Cartel Service;* which is generally to facilitate an intercourse between hostile Ports. The voyage is from one *French* Port to another; and as to the protection of *Passports*, from any person or authority on the Part of this Country, the master does not pretend to have had any other passport, than what he carried out with him from *Bourdeaux*. It was owing to the want of some such document, that the truth or sufficiency of his pretensions to cartel were called in question; and on this ground only, according to the evidence of the *French* master, the captor, proceeding with great caution and delicacy, thought himself justified in bringing this vessel to adjudication. Recourse is now had to the personal safe conducts which General *Noques* and the other persons on board had received from the *British* Commander at *St. Lucie*. On the surrender of that island, it seems that permission was given to General *Noques* to proceed to *Martinique* or to *France* on his parole. This permission arose entirely out of the request of General *Noques* to be allowed to go on his parole, and though it was extended afterwards to other persons, the terms of their safe-conduct extended no farther than "to go to *Martinique* or elsewhere, in a neutral ship or flag of truce." These gentlemen went to *Martinique*, and there, without the intervention of any authority on the part of this country, the character and exemption of cartel, in favour of this vessel, is engrafted on these mere personal passports for the security of the gentlemen themselves. Was it reasonable that such

La Gloire.

Dec. 2d, 1803, and July 14th, 1804.

effect should be attributed to them? Suppose their affairs had led them different ways, could it be contended, that each person might have hoisted his cartel flag, and have protected a separate ship? Could there have been any such understanding between General *Greenfield* and General *Noques* at *St. Lucie?* The whole permission arises out of the request of the *French* general, and should be restricted to it. In that request there is not a word of any such consequence. Had General *Greenfield* any authority to grant such protection to a vessel which had never been under his power? In capitulations, the act of the commander on all property, which is the object of the contest and as such subject to his discretion, would undoubtedly be binding; but *St. Lucie* was taken by storm; there was no capitulation. If General *Greenfield* had intended to give up a *French* vessel in safety, why did he not send off one of those taken at *St. Lucie.* Nothing of that kind is done. The Conventions (*a*) of commanding officers are in some respects to be strictly construed; and it might, on just grounds be questioned whether General *Greenfield* had authority to grant protection to a vessel sailing from another place, that had never been under his authority. Without insisting, however, on the *invalidity* of such an act, if actually done, it will be sufficient to infer from the questionable nature of the act itself, that all general

(*a*) Les Conventions de Géneraux, dont nous venons de parler, regardant les Affairs d'autrui, le sens en doit etre restreint, autant que le permet la nature de l'accord; en sorte que, d'un coté, le Souverain ne soit point engagé par là plus qu'il ne voudroit, s'il traitoit lui méme; and que, de l'autre, les Generaux ne souffrent point de dommage en faisant leur devoir. "*Grotius,* l. 3. ch. 22. § 10.

probability

probability is against such an intention on the part of the *British* officer. The case set up is a case of exemption, in which the burthen of proof lies on the party asserting such a privilege. As the evidence adduced by no means supports the claim, the vessel cannot be held entitled to protection, but must stand upon the same footing as any other enemy's ship, and as such be subject to condemnation.

On the part of the Claimants, Swabey and Adams contended—that it was a transaction of perfect good faith on the part of the master; that it was made a condition of the charter-party that the vessel should be fitted out strictly as a cartel ship, without taking a cargo or bearing arms; that the passports of General *Greenfield* and General *Brereton* went beyond the purpose of granting a mere personal protection to these gentlemen, and were represented to the master as sufficient to confer the protection of cartel: that the Court would consider such a transaction most favourably to support the good faith of the nation, and protect the claimant against a mere defect of form, if indeed these passports should be held not to come up to the formalities usually observed in cases of cartel.

JUDGMENT.

Sir *W. Scott.*—This vessel was taken sailing under a flag of truce, that is, under the *English* and *French* colours joined together. The flag of truce alone would not be sufficient to afford protection, because it might be fraudulently assumed, or without authority. A claim, however, is given under a special representation of the circumstances that led to this transaction, stating it to have arisen from the agreement of General *Greenfield* and certain *French* Officers, who had

LA GLOIRE.

Dec. 2d, 1803, and July 14th, 1804.

become prisoners of war on the capture of *St. Lucie*. Something has been said, in argument, of the extent of the power of General Officers to contract with the enemy in Capitulations. Certainly, nothing can be more sacred than such agreements: they are to be held most inviolate; it is scarcely possible to conceive any terms, however incommodious, that ought not to be most faithfully observed in the execution of such contracts. This, however, is not an agreement of that kind. It appears that *St. Lucie* was taken by assault, without any capitulation, and that after the surrender, General *Greenfield* granted permission to the *French* General to proceed to *France*, on parole not to serve again till exchanged. It was therefore not a contract, as far as appears, of mutual benefit, but a matter of indulgence, to be favourably considered indeed, as the act of a General Officer who may be supposed to have been the best judge of the propriety of the measure at the time; but something, which does not bind his country precisely to the same extent, as a capitulation of war, by which some return of advantage is stipulated and obtained for his Country. General *Greenfield*'s letter, which is first to be considered, states, "that General *Noques*, being desirous of returning to *France*, has my approbation, and is at liberty to go to *Martinique*, and afterwards to *France*, on condition," &c. This is a personal liberation, and by no means ascertains the vehicle in which he was to go. It does not appear from this instrument, whether General *Noques* was to take a *French* ship and protect her under this permission; nor indeed whether the mode of conveyance had at all entered into the contemplation of the parties. It would therefore be impossible for me to determine on the evidence

La Gloire.

Dec. 2d, 1803, and July 14th, 1804.

dence of this letter alone. There is another letter from General *Brereton*, who was left in command at *St. Lucie*, which in answer to a second application, to include certain other persons, grants permission, "to go to *Martinique*, and afterwards to *France*, as they might find most convenient." That also is a very general expression: which might refer only to their *own situation and character*, and might only mean that they should go in the most undisturbed manner, provided they found neutral ships, or cartels, or any other innocuous vehicle. There is a third instrument from General *Brereton*, which signifies "a permission to go to *Martinique and France, in a neutral ship or flag of truce, or elsewhere, where their affairs may require.*" These gentlemen go to *Martinique*, and there this vessel is taken up as a *cartel ship* by virtue of this permission, though not strictly a cartel ship; and certainly, if the master can be supposed to have entered into this engagement sincerely, under the persuasion that he was to be protected by the privileges of cartel, without considering strictly how far the authority of General *Greenfield* might be competent to confer such exemption, I think, that the Parties will be entitled to very indulgent considerations, in regard to the restitution of this property. The claim is given on the affidavit of the master, who certainly does not support his averment in the full extent; but he does not appear to be exposed to any imputation of *mala fides* on that account. He states the agreement of the *British* commander to have been, "that these gentlemen might go in any *French* ship which they could take up." That is not to the full supported by any evidence that appears in these papers. If, under such a representation of the agreement, made to

La Gloire.

Dec. 2d, 1803, and *July* 14th, 1804.

this man, the French Officers had taken up this vessel, it would, I think, be straining matters to a degree, not quite discreet or legal, to object against the validity of such a protection, that it was not strictly in the form of cartel, unless it could be shewn that such pretensions had been brought forward from some unfair or fraudulent motive. It is possible, that in this representation the master spoke only according to what he had learned in conversation, and relied upon, as an honest communication, for he was no party to the original agreement. What I shall direct in this state of the case will be, that affidavits may be introduced to shew what the real understanding on this point was, between General *Greenfield* and the *French* General, and whether the representation made to the master, was conformable to what he states in his affidavit.

On a subsequent day, 19th *July*, the affidavits of General *Brereton* and General *Noques* were exhibited, by which it appeared, that the course of the transaction had been agreeable to their joint understanding of the permission granted. On this evidence,

Court. — When this case came on before, the Court intimated a disposition to sustain the claim, if it should appear to have been the understanding of the parties, and particularly of the Party granting the Permission, that a ship sailing on this service, under a flag of truce, should be protected, though not strictly a cartel. Whether the *British* commander might have exceeded his powers, or have made an improvident concession, would not, I think, supersede the obligation which this Court would feel itself

self under, to support the good faith of the agreement, on which the other party had acted with confidence. The prisoners were sent to *Martinique*, probably for mutual convenience; This contract was then entered into between the prefect of the Government of that place, and the master of this ship, under the direction of the Captain General. It is now certified not to have exceeded the intention of the *British Officer*, under whose permission these prisoners were allowed to return to *France;* and that is the point to which I principally look, and which approaches to the foundation of the principle laid down by the Court in the case referred to. * Something has been said of the bad faith which the Government of *France* has practised on some similar occasion, in detaining a vessel sent regularly as a cartel ship from this country to a port of *France*. Such a behaviour would, on no account be resorted to as a precedent, to which this Court would attend, in considering the proper effect of the proceedings of these parties in this transaction. I am of opinion, that the representation of the claimant is substantially confirmed by the *British* Officer, and I shall decree restitution; giving the captor the expences of taking the depositions, and of the farther proof that has been necessary to clear up this matter.

LA GLOIRE.

Dec. 2d, 1803; and *July* 14th, 1804.

* Adm. Repts. *Daffie*, Vol. 2. p. 143.

THE MARY, FOLGER.

Nov. 26th, 1804.

IN this case another question of cartel came before the Court, which, from the public importance of a right understanding of such matters, is here brought forward without regard to its order of date.

Cartel — Act of rescue by Prisoners under Cartel *invalidated*, Property *so rescued*, does not fall under the Provisions of the Prize Act for *British* Property *recaptured* from the Enemy. — Not restored to the original Owner, but given up to the Disposal of his Majesty, at the Prayer of the Crown.

It

The MARY. Nov. 26th, 1804.

It appeared that the *Mary* was a *British* Whale ship which had gone into the *Cape of Good Hope* for a supply of provisions, and ignorant of hostilities. The ship was seized, and the crew imprisoned, except the first and second mates, who were allowed to go at large on their parole, and a prize-master and five men were put on board the vessel. In the mean time the *Matilda*, an English cartel ship, came in, going with *French* Prisoners from *Pondicherry* to *France*. (*a*) The crew of the *Mary*, with the two mates, were put on board the *Matilda*, with an intimation, *according to their evidence*, taken at *St. Helena*, "that they were to consider themselves as "prisoners of war, to be carried to *France*, and be there exchanged." In the night of the 4th of *February*, these men let themselves down in the boat of the *Matilda*, and got on board their own vessel and took her to *St. Helena*, where she was detained by the Governor, and sent home, with an account of the transaction to the officers of Government. Proceedings were instituted on the part of the Crown, alleging the capture to have been made illegally, and praying that the Court would direct the vessel to be given up, at the disposal of his Majesty. An appearance was also given for the original owners for restitution of their ship, and for the crew for salvage, as in a case of rescue.

After some discussion of the facts, the Court stopped the argument: observing—It appears to me,

(*a*) The Preamble of the agreement stated the *primary* Destination of the *Cartel* Ship to have been to *France*, for the purpose of exchanging the *French* Prisoners, but the terms of the Cartel, with respect to these Mariners, were, that *they* should be sent to *England*, to be there exchanged for *Dutch* Prisoners.

that

The Mary.

Nov. 26th, 1804.

that the Court is not at present sufficiently instructed as to some material circumstances of the case, — whether these men were going to *France* or not, and whether they came on board by their own consent, or under any engagement, in which Captain *Shaw* the *English* Commissary pledged his faith for them. It may be a question whether Captain *Shaw* might have authority to bind them to his act; but that question may not arise if they were put on board with their own free consent, and acquiescence, to be carried to *England*, and under engagements to conduct themselves inoffensively. That is one possible state of facts. It is likewise possible, that another very different state of facts might have existed, namely, that they were forced on board this vessel, to be carried to *France* as prisoners of war. In that case the cartel ship would be no cartel to them; it would be a prison ship, and no more; The propriety of their conduct in effecting their escape, and the liberation of their own vessel, would be most materially influenced by the rights and the duties resulting from the one situation or the other. According to their own representation, they were involuntary prisoners destined to *France*. It is of importance to learn from Captain *Shaw*, whether this representation is well founded, and I direct the case to stand over till the return of Captain *Shaw*, who, I understand is shortly expected.

On this day the case came before the Court on the affidavit of Captain *Shaw*, with a copy of the articles of Cartel annexed, by which it appeared, "that in consequence of the representation made by Captain *Shaw*, of the great want of able Seamen to navigate the Cartel Ship, and of Captain *Shaw*'s proposal to take on board the Crew of the *Mary* to be exchanged

The MARY.

Nov. 26th, 1804.

changed in *England*; these mariners were given up to him under a stipulation, on his part, that he would not dispose of, or leave them, at any place on his voyage; but that he would convey them in security to *England*: That the terms of their release were made known to the prisoners, and that they expressed great satisfaction in them, and promised to work and give every assistance in their power."

JUDGMENT.

Sir *W. Scott.* — This ship, being an *English* South Whaler, went into the *Cape of Good Hope* ignorant of hostilities, and was there seized. The men were taken out and put into a *Dutch* prison; after they had been there some time, an *English* cartel vessel, with *French* prisoners from *Pondicherry*, came in, and a negotiation was set on foot between the *English* Commissary of that cartel, and the *Dutch* Governor, for the release of these men, for the purpose of carrying them to *England*, to be there exchanged for *Dutch* prisoners.

When the cause came on before, the place of their destination was not sufficiently established. It was represented on the part of the mariners, that they were to be carried to *France*, which might be a change of situation very disadvantageous to them, as they might perhaps be reasonably unwilling to exchange a *Dutch* prison for a confinement in *France*. Under these circumstances it was contended, that they would be under no obligation as to their behaviour; but that they would remain perfectly at liberty to effect their escape, in any manner that they could. It now turns out from the affidavit of Mr. *Shaw*, "that their destination was to *England*, and *not to France*; that they expressed great satisfaction

faction at the opportunity afforded them of a return to their native country, and engaged for their peaceable demeanour." The case becomes, therefore, in this view, extremely different from a case of oppression, and continued imprisonment, exercised upon unwilling parties. What the law might have been in such a case, it will not be necessary to enquire; Whether they must have been held bound by the undertaking of a person acting as Commissary for prisoners, and coming there in that character, and with apparent authority, I will not take upon me to determine; as the question does not necessarily arise out of the circumstances of this transaction. I should be unwilling to drop an expression, that might be thought to derogate from the sacredness of cartel vessels, or to diminish the inestimable utility, which the world enjoys in the acknowledged inviolability of their character: I shall therefore decline to enter upon a question, that is rendered unnecessary by a material fact in this case, which now turns out to be, that these persons were put on board by their own consent, on terms that were explained to them, and fully acquiesced in by themselves. They were bound, by their own engagement, as strongly as men could be, to abstain from all acts of violence, and to do nothing which had the least connection with hostility. In violation of the duties which they had thus stipulated for, from a spirit of heedless enterprize, belonging to such men, I imagine, rather than from any more improper motive, they seize the boat of the cartel ship, attack their own vessel by the means of this boat, and carry her off by force against all opposition. At *St. Helena*, where they carried her, she is detained by the Governor, as having been taken from the

The MARY.

Nov. 26th, 1804.

The Mary.

Nov. 26th, 1804.

Dutch by an illegal act of capture, and is sent here for the judgment of this Court. The ship and cargo have since been converted into money, and the parties now before the Court are—The Crown standing in the character of the representative of this Country in its foreign relations—The owners praying restitution of their property, as in a case of an ordinary recapture.—And these Mariners praying salvage. Of the claim for salvage I have already disposed, by the observations which I have just made. The whole case of the salvors is *a case of demerit*, and a demand of remuneration, is the last which in prudence they ought to make.

On the claim of the original Proprietors, I am of opinion, that it is not such a recapture as will revest their interest. It is contended, that it falls under the general terms of the prize act, which directs "*that* "*all ships* and goods belonging to his Majesty's sub- "jects, which were before retaken and surprized by "*his Majesty's enemies*, and are at *any time after-* "*wards surprized and retaken by any* of his Majesty's "ships, &c. *shall be restored, on salvage.*" But I cannot think that this recapture is of such a nature, as can be deemed *a legal capture*. An act which is in itself illegal, can convey no right. It must be understood that the *surprising and retaking* described by the act of parliament, must be *such a surprising and retaking*, as the law would acknowledge and justify, and not such a *surprising* and *retaking*, as being in itself piratical, must be deemed a nullity as to any legal effect. Here is a *surprising* and *retaking*, that has been effected through a violation of contract, by persons pretending to act upon rights which they had parted with, as well by their own engagement,

Sect. 39.

as

The MARY.

Nov. 26th, 1804.

as by the nature of the situation in which they were placed. Such an act is essentially invalid, and can have no legal consequence attached to it, either for the benefit of those persons themselves, or for the benefit of others who may claim through them.

It has been objected that there is no complaint before the Court, on the part of the *Dutch* Government; but the actual feelings of the *Dutch Government* are sufficiently apparent from the affidavit of Mr. *Shaw*, who states, "that the crew of the cartel were immediately thrown into prison;" a *consequence* which sufficiently demonstrates the extreme mischief, and inconvenience, resulting from inconsiderate attempts of this kind. After such an expression of feeling on the part of the *Dutch* government, it can scarcely be doubted, that some representation *was made* of the injury received; though the forms of proceeding here may have prevented it from being brought immediately to the notice of the Court. Independent of such a remonstrance, considering the *Dutch* Government to be aggrieved, as undoubtedly an enemy may be aggrieved, by an undue exercise of the rights of war, and considering the interest which the Crown has in preserving the sanctity of good faith in all our public relations to foreign States, I cannot think that the Court will be guilty of any injustice, in decreeing this property to be delivered to His Majesty, to be by him disposed of, as his sense of justice towards the injured Government may direct.

APPENDIX.

INSTRUCTION, 24th *June* 1803.

IN consideration of the present state of commerce, we are pleased hereby to direct the commanders of our ships of war and privateers, not to seize any neutral vessel which shall be carrying on trade directly between the colonies of the enemy and the neutral country to which the vessel belongs, and laden with the property of inhabitants of such neutral country: Provided that such neutral vessel shall not be supplying, nor shall have on the outward voyage supplied, the enemy with any articles contraband of war, and shall not be trading with any blockaded port.

INSTRUCTION, 1st *February* 1805.

WHEREAS we have judged it expedient that interruption should not be given to the supplying the kingdom of *Spain*, in its present distress, with grain, notwithstanding the existing hostilities: we do hereby direct, and strictly enjoin the commanders of our ships of war and privateers, not to molest any neutral vessel laden solely with grain, and going to *Spain*, to whomsoever the said grain may belong, unless it be brought from, or be destined to, a blockaded port.

London: Printed by A. Strahan,
Law Printer to the King's Most Excellent Majesty.

REPORTS

OF

CASES

DETERMINED IN THE

IGH COURT OF ADMIRALTY,

&c. &c. &c.

SAN ANTONIO, ——

May 30th, 1804.

THIS was a queſtion reſpecting a flag ſhare, demanded by Lord *Keith*, as Commander in Chief the ſtation to which the capturing ſhip was tached, and reſiſted on the part of Sir *J. Saumarez*, on a ſuggeſtion that he was acting under ſepate orders from the Admiralty.

Flag ſhare—Suggeſtion on the part of Sir *J. Saumarez* that he was employed on a ſeparate ſervice, by order of the Admiralty, not ſuſtained.

On the part of Lord Keith, the King's Advocate and aurence. This queſtion comes before the Court on a Act on Petition, ſtating all the Circumſtances on hich a right to a flag-eighth is demanded by Lord *eith*, and reſiſted on the part of Sir *J. Saumarez*. he proclamation of the late war, by which the queſon is to be decided, directs, "That when an inferior ag officer is ſent out to reinforce a ſuperior flag

The SAN ANTONIO. May 30th, 1804.

officer, that ſuperior flag officer ſhall have no ſhare in prizes captured by the inferior flag officers, before he arrives within the limits of the ſtation of the ſuperior flag officer, and actually receives orders from him." That Sir *J. Saumarez* had arrived within the ſtation cannot be doubted, as he had arrived at *Gibraltar*, which is an important poſt of that ſtation, where the Commander had been much reſident, and where it might be expected that general orders would be left; and, in fact, a ſhip was left at *Gibraltar* to communicate orders, quite ſufficient to anſwer the words of the Proclamation. As little doubt can ariſe on another important point, that Sir *James Saumarez* was intended by the Admiralty to be placed under the orders of Lord *Keith;* this is manifeſt from the whole tenor of his inſtructions; and although he was directed to correſpond with the Admiralty, he was alſo directed to correſpond with Lord *Keith*, and to give him notice of his operations. The orders left behind at *Gibraltar* by Lord *Keith*, on going to a diſtant part of his ſtation, were addreſſed, "*To Sir Eraſmus Gower, or any other flag officer appointed to act on this ſtation.*" They were not confined to one in particular, but were directed to all who ſhould be appointed to act on that ſtation. Sir *Borlaſe Warren* had opened them, and acted in conformity to them, and had left them for other officers who might ſucceed. Sir *James Saumarez*, arrived in *June*, after having engaged the enemy's fleet in *Algeſiras Bay*. That he conſidered himſelf under Lord *Keith*'s command is evident, from his own conduct in writing to him an account of that engagement, and in taking with him a veſſel belonging to Lord *Keith*'s ſquadron, when he

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The SAN ANTONIO. May 30th, 1804.

ſailed again in queſt of the enemy. But the defence ſet up is, "That though theſe orders might be received, Sir *James Saumarez* never read them, and that he was not acting under them." This is an averment that can on no principle be admitted. Here were orders delivered to him by Captain *Prevoſt*, "as *general orders for all flag officers coming here to be under the command of Lord* Keith;" and if an inferior Officer could be at liberty to refuſe to open them, it would be in his power to keep himſelf detached from the ſtation, and under the orders of the Admiralty, as long as he pleaſed. The Act of Court goes on to ſtate, "that Sir *J. Saumarez* received a letter from Lord *Keith* in the month of *Auguſt*." But ſurely it cannot be contended that it is neceſſary, that the orders deſcribed in the Proclamation ſhould be iſſued to each inferior flag officer individually, and after the Commander in Chief had received intelligence of that particular officer's appointment. It is next ſtated in the Act, that the orders had been opened by Sir *Borlaſe Warren*, as if it was intended to be maintained that their effect would, with regard to other ſucceeding flag officers, be defeated by that circumſtance. This ſurely cannot be contended. They were general orders, left, as the ſtanding regulations of the fleet, at the place where all officers appointed to that ſtation might be expected to call. All the grounds of defence that can be collected from the Act of Court, muſt fail to bring this caſe within the reſtrictions which create exceptions to the general right of flag officers under the Proclamation, and conſequently Lord *Keith*'s claim to his flag-eighth muſt be eſtabliſhed.

The San Antonio.

May 30th, 1804.

On the other ſide, Arnold.—That Sir *J. Saumarez* was arrived within the limits of the ſtation, cannot be denied; but the queſtion is, whether the caſe, under all its circumſtances, falls within the words of the Proclamation. The ſervice on which Sir *J. Saumarez* was ſent, was not for the general purpoſe of reinforcing Lord *Keith*. It is not ſo expreſſed: It was not ſo in ſubſtance. He was not directed to follow the courſe which Lord *Keith* might have taken, but he was directed by the Admiralty to go to a particular place, and perform a particular ſervice. He was to go to *Cadiz*, and blockade that port—to watch the enemy, and if they attempted to come out, to follow them to any place to which they might ſail. He was alſo to watch a *French* force that was expected to come out of *Ferrol*, for the purpoſe of joining the *Spaniſh* fleet,—he was to follow that force alſo, and to endeavour to bring them to action. Here were ſervices enjoined, that might in fair probability have led him far out of the limits of Lord *Keith's* ſtation, and have entirely prevented all co-operation with him. It is contended, therefore, that Sir *J. Saumarez* was not ſent to *reinforce* Lord *Keith* under the terms of the Proclamation, but to perform a ſpecial and diſtinct ſervice under the orders of the Admiralty. As to the orders ſuppoſed to be received, it is not averred that there was any communication of general orders, from the veſſel taken by Sir *J. Saumarez* under his command. If it is to be inferred in any manner, that there would be ſuch a communication, it might have been merely as matter of private information, and cannot be conſidered as a communication from the ſuperior flag officer to him. What is principally relied

lied on, however, is the communication made at *Gibraltar*. But this is no communication of orders from Lord *Keith* to him. They are deſcribed as ſtanding orders for the port of *Gibraltar*, and the latter part relates to ſervices to be performed at *Malta* and *Port Mahon*, under the general ſervices of the ſtation, in which Sir *J. Saumarez* could not be employed. He was confined to a particular object by the orders of the Admiralty, and was therefore incapable of executing any orders at *Malta* or *Port Mahon*. They were orders that did not apply to him, and were on that account neglected by him. They cannot therefore be conſidered as orders, which had ſuch a reference to him, as to bring him under the command of Lord *Keith*. It is ſaid that his own conduct in writing to Lord *Keith*, ſhews that he thought himſelf under Lord *Keith*'s command.—By no means. It was a part of his inſtructions from the Admiralty, that he ſhould ſo write, as indeed it might be very important that Lord *Keith* ſhould be made acquainted with every diſpoſition of the enemy, even by perſons who were not in any degree ſubject to his command. But if Sir *J. Saumarez* had been under an error as to the preciſe nature of his ſituation, and the duties he owed to Lord *Keith*, it will not vary the principle of Law, by which the caſe is to be governed, on a more mature conſideration of all the circumſtances applicable to it: It will have no effect to ſupply that other requiſite under the Proclamation, "*That the inferior flag officer ſhould have received orders from his ſuperior.*" It is ſubmitted that no ſuch orders have *been received*, and that the flag eighth is not due to Lord *Keith* in this caſe, under the terms of the Proclamation.

The SAN ANTONIO. May 30th, 1804.

In reply, the King's Advocate and Laurence.—It may be material to point out, What are the particular ſervices which are ſaid to have been impoſed on Sir *J. Saumarez* by the Admiralty, from whence it will appear that they were perfectly conſiſtent and coincident with the general ſervices of the ſtation? Government having received information, which could not be known to Lord *Keith*, ſent this force, not on a *ſeparate ſervice*, but to *reinforce* a particular part of the operations of Lord *Keith's* ſtation. Sir *J. Saumarez* was to watch the *French* and *Spaniſh* fleets, both within the limits of the ſtation, and forming the ſubject matter of a part of the orders which Lord *Keith* left behind at *Gibraltar*. This, therefore, cannot be taken as a *new* or *ſeparate ſervice*; it had already been made a part of the diſpoſition of Lord *Keith's* force, and the ſhips ſent under Sir *J. Saumarez* were deſigned as a particular reinforcement for that purpoſe. How does Sir *J. Saumarez* act on his arrival at *Gibraltar?* He ſuperſedes the Officer left in command there by Lord *Keith*, and takes the *Calpe*, a part of Lord *Keith's* force, away with him, but not out of the limits of the ſtation. He received the general orders, which were not, as it has been deſcribed, orders for *Malta* and *Port Mahon*, but orders for the general ſervice of the ſtation, of which this very object of blockading *Cadiz* formed a material part. Theſe will fully anſwer the words of the Proclamation, which ſeem to be framed ſtudiouſly with great latitude, as meaning, no doubt, to infer that any ſort of actual communication from the ſuperior flag-officer would be ſufficient. The limits of this ſtation appear to have extended from *Cape Finiſterre* to *Cape le Gat*. In what a ſituation then would the commanding officer be, as to his intereſt in the flag-

eighth,

eighth, if it could be held that the orders to be given muſt be directed ſpecifically and individually to each inferior flag-officer, that ſhould be ſent out out to join the general operations, at what may be called the head quarters of the ſtation.

JUDGMENT.

Sir William Scott.—This queſtion turns on the interpretation of that paſſage of the proclamation, which directs, that " when an inferior flag-officer is ſent out to reinforce a ſuperior flag-officer, the ſuperior flag-officer ſhall have no right to any ſhare of prizes taken by the inferior flag-officer before the inferior flag-officer ſhall arrive within the limits of the command of the ſuperior flag-officer, and actually receive ſome order from him." In this caſe, I think, it is not denied, that Lord *Keith* was Commander in Chief on the *Mediterranean* ſtation, and that Sir *James Saumarez* was ſent out for the general Purpoſe of reinforcing him, becauſe the words of the order were, " to put himſelf under Lord *Keith*'s command;" it is certainly not neceſſary that the word *reinforce* ſhould be uſed; it is ſufficient, I conceive, if an inferior officer is directed to put himſelf under the command of his ſuperior for the purpoſes of general co-operation. The mere arrival alone, however, is not ſufficient; another requiſite circumſtance is, that he ſhould have received ſome orders from the Commander on the ſtation. The terms of the proclamation are very general, "*ſome orders*;" but there muſt be *ſome*, by which the authority of the Commander in Chief over this particular part of his Force is ſhewn to have veſted in him. It is certainly true, that, beſides the general ſervice of *reinforcing*, the inferior officer may have a diſtinct and ſeparate ſervice con-

The SAN ANTONIO.

May 30th, 1804.

fided to him by the Admiralty, which, though to be performed within the limits of the ſtation, may not be connected with the general purpoſes for which the Commander of the ſtation is employed. This is a poſſible thing; but it would require, I think, a ſtrong caſe, to ſhew that a diſtinct and ſeparate ſervice was intended; the preſumption being undoubtedly, that, where a ſervice is to be performed within the limits of a ſtation, it is co-incident with the general ſervices on which the Commander in Chief is employed, uſually, with a very large diſcretion, as to the means of annoying the enemy with the beſt effect. In this caſe, there are orders given by the Admiralty; and the queſtion to be conſidered is, Whether they are of a nature to take the officer, entruſted with them, out of *the effect of this preſumption*, and to detach him from the force, with which on general grounds he muſt be ſuppoſed to be aſſociated. I cannot ſay that they appear to me to be of that kind. The *Mediterranean* ſtation was of very wide extent, comprehending ſervices very miſcellaneous in their nature, and of great importance. If orders were given to Sir *J. Saumarez* reſpecting the blockade of *Cadiz*, and reſpecting his co-operation with the allied fleet of *Portugal*, it is not neceſſarily a diſtinct and ſeparate ſervice, with which Lord *Keith* had nothing to do, and which kept Sir *J. Saumarez* in a ſtate of emancipation from him; ſince theſe were ſervices on which part of Lord *Keith*'s force was then operating. The terms of the orders to Sir *J. Saumarez* are "*to invigorate the blockade* of *Cadiz*," which Lord *Keith*'s force was then keeping up. Sir *J. Saumarez* came within the limits of the ſtation: he heard of an enemy's ſquadron in *Algeſiras Bay*, and attacked them, but unſucceſsfully, and went to *Gibraltar* to refit, which was the

The SAN ANTONIO. May 30th, 1804.

the principal port of the ſtation, and might be called almoſt the head quarters of the Commander in Chief. When he was there, he received orders from Lord *Keith*, but it is ſaid that he did not read them. Certainly, this Court can never admit an averment that the inferior officer had not read orders that were directed to him, and were delivered to him by his ſuperior. Indeed, I cannot but obſerve, that Sir *James Saumarez* ſpeaks with ſome uncertainty on this fact, which I am inclined to think did happen, though it may have eſcaped his recollection. He ſays, "that he did not interfere with the Marine department, "*becauſe he was otherwiſe employed*," not becauſe he conceived that he had no authority, but becauſe his other duties prevented him: not that the orders reſpecting them did not apply to him, but becauſe he had a juſtifying excuſe for not attending to them. The orders were general, and not confined to the firſt officer that might arrive, but extending to all in ſucceſſion, who might come to put themſelves under Lord *Keith*'s command. Then what is there that does not bring this caſe within the words of the Proclamation? Here is an inferior officer ſent out to *reinforce*, for ſo I conſider this ſpecial ſervice, as being within the general ſervices of the ſtation. He was to put himſelf under the command of the ſuperior officer, to aſſiſt in the blockade of *Cadiz*. He had *arrived*, and *received orders*, which did in part apply to the particular ſervice, with which Sir *J. Saumarez* is ſaid to be ſpecially entruſted by the Admiralty, the blockade of *Cadiz*; and the prize in queſtion is a veſſel which had eſcaped from the blockading force. Orders of a more general nature would, I apprehend, have been ſufficient; ſince all that would be required is ſome exerciſe of authority

The SAN ANTONIO.

May 30th, 1804.

authority, to ſhew that the relation ſubſiſting between a Commander in Chief and the ſubordinate parts of his force had actually attached. Here is an exerciſe of authority connected with the very ſervice to be performed. Upon the whole of this caſe, I am of opinion, that it does fall within the words of the Proclamation, and that Lord *Keith* is entitled to his flag-ſhare.

May 30th, 1804.

THE TOBAGO, DE WITTE.

Bottomry, on an enemy's ſhip, is not an intereſt that can ſupport a claim in a Prize Court, on behalf of the bond-holder.

THIS was a caſe of a claim, on behalf of *A. B.* a *Britiſh* merchant, for the intereſt of a bottomree bond executed to him by the maſter of the ſhip, being a *French* veſſel, previous to hoſtilities.

Againſt the demand, the King's Advocate and Robinſon.—This claim is entirely unprecedented in practice, and is on various grounds wholly unſuſtainable. In the firſt place it might be queſtioned, how far the contingency on which all bonds of this kind depend, the ſafe arrival of the ſhip itſelf, can be ſaid to have taken place. The bond is made ſuitable againſt the veſſel, as the property of the owner, on her arrival in the port of *Dunkirk*, or any other port. Here a hoſtile ſeizure has intervened, which has *jure belli* ſuperſeded the former title of property, and has prevented the veſſel from entering, as a voluntary act of her own, either *Dunkirk* or any other port. There has not been ſuch an arrival, as would ſupport the ordinary liens of freight or wages as between the original

The TOBAGO. May 30th, 1804.

ginal parties; by parity of reaſon, this *ſecurity* alſo, depending on the ſafe arrival of the veſſel, muſt be extinguiſhed by capture with other liens. But if it is conſidered only on the ground of property, it is a general maxim of all laws, ancient and modern, that a thing pledged ſtill remains the property of the debtor, *Pignus in bonis debitoris permanere, ideoque ipſi perire, non dubium eſt.* And in the practice of all ſyſtems of juriſprudence, the interference of a Court of Juſtice is neceſſary to appropriate the pledge to the creditor, and convert the property. How then under this inſtrument merely can a ſubſtantive title of property be averred, which is neceſſary to ſupport a claim in a Prize Court? That it is not ſuppoſed to conſtitute property, will farther appear from conſidering what would be the caſe, if the intereſts in ſnch a tranſaction were inverted. Suppoſe a bond of this nature given upon a neutral ſhip, and to a perſon now become *an enemy*, could a proceeding of prize be inſtituted againſt the neutral ſhip, or any part of it, as the property of the enemy? Certainly not. The conſequence of admitting claims for ſuch intereſts, on behalf of a *neutral* bondholder, whilſt they would not be amenable to capture, in the hands of an enemy, would be to conſtitute a ſpecies of property which could in no caſe be ſubject to the rights of war—and that carved out of a deſcription of property, which is, in its own nature, moſt expoſed to the events of war. But, farther, if *it could be* conſidered as the property of the claimants, in what ſituation would it be placed?—at leaſt under the flag and paſs of the belligerent nation, ſubject to his controul and management, and convertible by him as occaſion might be, even to the operations of war. Such a mode of qualifying the immediate and oſtenſible intereſts

The Tobago. — May 30th, 1804.

intereſts in a ſhip would afford a moſt convenient cover to conceal the property of the enemy; and ſo miſchievous would be the conſequence of holding ſuch intereſts to be protected from the rights of war, that even if all other objections could be removed, it would be neceſſary to hold ſuch property in the hands and poſſeſſion of the enemy, liable to confiſcation. On every ground this is an intereſt that cannot be reſtored, but muſt follow the fate of the ſubject matter, on which it was engrafted.

On the other ſide, Laurence and Adams.—As to the dangerous conſequences that are apprehended from claims of this nature, it muſt be recollected, that ſuch intereſts can ariſe only out of circumſtances of diſtreſs, and therefore they are not very liable to abuſe, nor likely to be ſet up in fraud of belligerent rights. Still leſs is this danger to be apprehended from claims like the preſent, which is built on an event antecedent to the war, and independent of all contemplation of war. The objection cannot be ſuſtained, therefore, on the ground of the fraudulent *motives* that led to this tranſaction, nor of the conſequences likely to enſue, from admitting claims of this nature, which will at all times be liable to be ſtrictly examined with reference to their own particular circumſtances. The claimant in this caſe, being a *Britiſh* ſubject, has lent his money on an ordinary event of commerce, happening in time of peace, for the protection of property now fallen to the captor; he now ſolicits the aid of this Court, as his only remedy againſt a total loſs. Then as to the legal effect of ſuch bonds—they are introduced for the benefit of navigation, and for the ſecurity of the lender, and are with that view held

to

The Tobago. May 30th, 1804.

to conſtitute a *lien* ſo ſtrong, that they ſuperſede all other demands on the ſhip. That the ſhip had not arrived, is but an objection in words; for if the intereſt in the veſſel can be conſidered as a neutral intereſt, the old maxim, that capture is delivery, would apply to protect all ſuch demands. It is, beſides, an objection proceeding only from the act of the captor, who prevented the regular arrival, and can therefore not derive any benefit from a defect proceeding only from his own act. Captors are held to take, *cum onere*; they put themſelves in the place of the enemy, and are liable to the burthens attaching on the property in the courſe of navigation, in which it is ſeized. With regard to the caſe put of an enemy's intereſt of this deſcription, on a neutral ſhip, the diſtinction is obvious, that this intereſt is a thing acceſſorial only to the ſhip; and that it might well conſiſt with the principles of juſtice, that the acceſſory might be reſtored, though the ſhip was condemned; at the ſame time that it would not be reaſonable or juſt to ſeize the ſhip itſelf, on account of ſuch an acceſſorial intereſt, which an enemy might poſſeſs in it.

JUDGMENT.

Sir William Scott.—The integrity of this tranſaction is not impeached, but I am called upon to conſider, Whether the Court can conſiſtently, with the principles of law that govern its practice, afford relief. It is the caſe of a bottomree bond given fairly in time of peace, without any view of infringing the rights of war, to relieve a ſhip in diſtreſs—a contract certainly regarded with great attention and tenderneſs by this Court, when brought immediately before it. But can the Court recognize bonds of this kind as titles of property, ſo as

to

The Tobacco. May 30th, 1804.

to give perſons a right to ſtand in judgment, and demand reſtitution of ſuch intereſts in a Court of Prize? The total ſilence of thoſe who have argued for the claimant, as to any precedents for this demand, ſtrongly ſhews that it has not been the practice of the Court to conſider ſuch bonds as property, entitled to its protection; and I think I may venture to ſay that there has been no ſuch inſtance. The perſon advancing *money on bonds of this nature*, acquires by that act no property in *the veſſel*; he acquires the *jus in rem*, but not the *jus in re*, until it has been converted and appropriated by the final proceſs of a Court of Juſtice. The property of the veſſel continues in the former proprietor, who has given a right of action againſt it, but nothing more. If there is no change of property, there can be no change of national character. Thoſe lending money on ſuch ſecurity, take this ſecurity ſubject to all the chances incident to it, and amongſt the reſt, the chances of war. But it is ſaid, that the captor takes *cum onere*; and therefore that this obligation would devolve upon him. That he is held to take *cum onere* is undoubtedly true, as a rule which is to be underſtood to apply, where the *onus* is immediately and viſibly incumbent upon it. A captor who takes the cargo of an enemy on board the ſhip of a friend, takes it liable to the freight due to the owner of the ſhip; becauſe the owner of the Ship has the cargo in his poſſeſſion, ſubject to that demand by the general law, independent of all contract. By that law he is not bound to part with it but on payment of freight; he being in poſſeſſion can detain it by his own authority, and wants not the aid of any Court for that purpoſe. Theſe are all characters of the *jus in re*—of an intereſt directly and viſibly reſiding in the ſubſtance of

The TOBAGO. May 30th, 1804.

of the thing itſelf. But it is a propoſition of a much wider extent, which affirms that a mere right of action is entitled to the ſame favourable conſideration, in its transfer from the neutral to a captor. It is very obvious that claims of ſuch a nature may be ſo framed, as that no powers belonging to this Court can enable it to examine them with effect. They are private contracts paſſing between parties who may have an intereſt in colluding; the captor has no acceſs whatever to the original private underſtanding of the parties in forming ſuch contracts; and it is therefore unfit that he ſhould be affected by them. His rights of capture act upon the property, without regard to ſecret liens poſſeſſed by third parties: In like manner his rights operate on no ſuch liens, where the property itſelf is protected from capture. Indeed it would be almoſt impoſſible for the captor to diſcover ſuch liens in the poſſeſſion of the enemy, upon property belonging to a neutral; the conſequence therefore of allowing generally the privilege here claimed would be, that the captor would be ſubject to the diſadvantage of having neutral liens ſet up to defeat his claims upon hoſtile property, whilſt he could never entitle himſelf to any advantage, from hoſtile liens upon neutral property: This Court therefore excludes all conſideration of liens or incumbrances of this ſpecies. On the whole, I am of opinion, that there is no inſtance in which the Court has recognized bonds of this kind, as titles of property, and that they are not entitled to be recognized as ſuch in the Prize Court, however much the Court of Admiralty may be diſpoſed to uphold them in the other branch of its juriſdiction, when they are brought directly before it.

THE

June 6th, 1804.

THE PEARL, DENTON.
(Inſtance Court.)

Wages for a run to *Hull* forfeited by leaving the ſhip in the *Humber* before her arrival at the port of *Hull*.

THIS was a ſuit for wages, on a hiring of certain mariners for a run from the *Downs* to *Hull*; in which the defence ſet up was, that the mariners had quitted the veſſel before the voyage ſpecified in the contract was completed.

The King's Advocate and Laurence.—This is a caſe of much importance in principle, and particularly to the ſhip owners of the port of *Hull*. It appears that theſe mariners were hired by the maſter in the *Downs*, for the run to *Hull*, at twelve guineas per man, and that they were in fact only three days occupied in that navigation. When the ſhip arrived in the *Humber*, the port of *Hull* was ſo full that the veſſel could not enter immediately, and the maſter was induced to come to anchor in the Roadſtead, near to the Old Garriſon, where theſe men inſiſted on quitting the ſhip, as having completed their voyage. On the contrary, the owners maintain, that the mere anchoring in that Roadſtead is not an arrival in the port of *Hull*; that, in fact, veſſels are often loſt there; and that a diſtinction has always prevailed in the trade of *Hull*, of not paying wages until the veſſel is actually within the port. Under the general principles of the maritime law, the legal conſequence of deſertion, in wilfully quitting the ſervices of the ſhip, before her arrival in port, is the forfeiture of wages. The exiſtence and expediency of ſuch a law are ſo generally recognized,

The PEARL. June 6th, 1804.

that it is unneceſſary to enter into any argument on that point. The caſe reſolves itſelf rather into two queſtions of fact. Whether an arrival in the *Humber*, or in this Roadſted more particularly, can be deemed in law an arrival in the port of *Hull*; ſecondly, whether theſe men did not wilfully quit the ſervices of the veſſel without leave, and contrary to the expreſs notice given to them by the owners. On the firſt point it is evident, *ex vi termini*, that an arrival in the *Humber* is not an arrival in the port of *Hull*. None of the effects of *arrival* could be attributed to ſuch an anchoring, not in the port of *Hull*, nor even in the river of *Hull*, but in the *Humber*. It is certified that it would not have been a valid arrival for any purpoſe of inſurance, and that it was a known practice in the trade of *Hull*, not to conſider the arrival off this point to be an arrival in port. It is alſo proved that the owners warned the mariners not to leave the ſhip; indeed, the mariners themſelves offered to remit a guinea of their wages, or to hire others, which is an admiſſion that they had not diſcharged the whole of their duty. As theſe facts are eſtabliſhed beyond contradiction, the Court will perceive the importance of the general principle to the trade of *Hull*, and feel the neceſſity of enforcing the proviſions of the law, by pronouncing that theſe men have incurred the forfeiture of their whole wages.

On the other ſide, Swabey.—The terms of the agreement in this caſe were for a run from the *Downs* to *Hull*. Theſe men made no part of the original crew, but were taken up in the *Downs*, to ſupply a mere occaſional aſſiſtance; they were no parties to the ſhip's

The Peace. June 6th, 1805.

articles, and though the original crew might be obliged, by the nature of their engagement, to assist in the unlivery, it does not follow, nor does it appear to be the meaning of the terms of their contract, that these persons so picked up, should be detained for such purposes. They were hired for a run to *Hull*; and it is no immaterial circumstance in their favour that, on their arrival in this Roadsted, which is about half a mile from the port of *Hull*, the master thought that *they were* entitled to their discharge, and exerted himself to procure their wages for them. There was no unwillingness on their part to have brought the vessel into port, but the port was full, and could not receive them. This was a circumstance entirely out of their contemplation at the time of hiring, and if it can be urged in any degree as sufficient to protract their obligation, it might be carried to an extent of evident injustice, if it could be supposed that they were bound to wait any length of time, in attendance on the vessel, without being entitled to additional remuneration. The act which is imputed to them is certainly not to be classed with ordinary cases of desertion, since they did not quit the vessel without the consent of the master, and were supported in *their* construction of the contract by him, who cannot be supposed to have been unacquainted with the customs of the port of *Hull*. It is not such an act as can be held to draw on it the penalty of wilful desertion. On the contrary, the terms of the contract are to be taken as fulfilled, so as to entitle these men to their whole wages.

JUDGMENT.

JUDGMENT.

The PEARL. June 4th, 1804.

Sir William Scott.—In order to maintain a claim of this kind, a mariner muſt prove one of two points, either the performance of the contract, or that ſome circumſtance had intervened, which would equitably diſcharge him from the obligation of the contract, and continue to him the benefit of a legal and virtual performance. The preſent contract was made by the maſter in the *Downs*, for the advantage of his owners, and if the port of *Hull* had not been mentioned, the conſtruction muſt, I think, have been the ſame, becauſe it is not the *Humber*, which may in popular language be ſometimes called *Hull*, but the port which is to be underſtood as the *terminus ad quem* of the deſtination, and as the place where the ſhip is expected to be moored in ſafety. If *Hull* only had been deſcribed, I think the legal interpretation muſt have been the ſame. But the terms of the contract are *the port of Hull*, which, it is admitted, and indeed cannot be denied, is not the *Humber*. For the purpoſes of the Cuſtoms, the *Humber* may, perhaps, be conſidered as the port of *Hull*, but not for other purpoſes connected with the general intereſts of navigation. It is, in fact, a place in which the veſſel would continue to be very much expoſed to all the accidents of the voyage; and, I conceive, the fact may be as it is repreſented, that inſurers would not be releaſed from their engagement by ſuch an arrival. Sailors are not uſually diſcharged there; and it affords no inference to the contrary, that in this inſtance the *ſea pilot* had been diſcharged, as is not unuſual on entering a *river*, though ſuch entrance is no termination of the voyage. That circum-

The PEARL.

June 6th, 1804.

ſtance would not prove more than that the ſea voyage was at an end; which may be, though, if the port lies far up the river, a river pilot may be ſtill neceſſary for the completion of the whole voyage. The obligation of mariners is for the whole voyage, in the river as well as at ſea; and if the port lies high up the river, a very conſiderable portion of their ſervices may remain to be performed in the river. On the firſt point, therefore, I am of opinion that the claim cannot be ſupported on the mere legal grounds of the abſolute concluſion of the voyage. Then, to ſupport their demand, we muſt reſort to equitable grounds, and ſee whether there were any juſtifying circumſtances which prevented their arrival, independent of any failure in performance of duty on their part. It is ſaid that the maſter gave them his conſent, and therefore that this act was not an act of *deſertion*, which is deſcribed to be the wilful quitting of the ſhip without the conſent of the maſter. It appears, undoubtedly, that the maſter did conſent as far as he could; but it appears alſo, I think, that he acted raſhly in ſo doing; and it is to be lamented that he has, perhaps, been the inſtrument of miſleading theſe men. He was unacquainted with the limits of the port, and with its cuſtoms, and therefore he ought to have been very guarded in the opinion that he expreſſed. But had he any authority to conſent, in oppoſition to the declared will of the owners?—Certainly not. He was not a perſon intereſted in the contract, but a mere agent for the benefit of the owners. The owners themſelves came on board, and told the mariners that they had not arrived

in port, and that they were not to be discharged. The master was but their representative in making the contract, and they had a right to insist on the full performance of it. There was a supercession of the master's authority, which, in ordinary cases, where no owner appears, might be sufficient; but in this case, it would not justify the mariners, in opposition to the owners, expressing their direct prohibition, and standing on their legal rights. This excuse, therefore, will not be sufficient. The only other ground is, that the port was so full that the vessel could not enter; though the men were willing to go in. That brings the case to this question—Whether if a vessel cannot enter at the very moment when she comes to the port, the mariners are at liberty to say, "Good bye to you, we are entitled to our wages."—I am of opinion, that such conduct cannot be defended; and that it could not be, till after some time of just expectation of the removal of the difficulty, that they would be entitled to their dismissal. If a ship cannot get in, she is, on that very account, more in need of the services of the crew. If the fact be as it is stated, that the port is too narrow to admit all vessels, it may be, in future, a fit foundation of a special agreement; because, though on one hand it would be too much to say, that if the ship cannot get in the first day, the men shall be discharged; yet, on the other, it may be attended with great hardship to mariners to be detained if the impediment is likely to train on for any considerable length of time. It might, therefore, be a fit subject of private agreement, as to this port, and others under simi-

The PEARD. June 6th, 1804.

lar circumſtances. In this caſe it appears that there was no ſuch proſpect of a laſting impediment. The ſhip did actually get in within a week; and when it is conſidered that theſe men were to receive twelve guineas each for the run, which had only taken up four days, a week's delay does not ſeem to be too much to fall under the terms of ſuch wages. This is, indeed, in ſome degree admitted by themſelves, in the offer which they made of money to procure ſubſtitutes. On the whole caſe, I feel myſelf bound to pronounce that the veſſel had not arrived, and that the circumſtances ſtated, are not ſufficient to juſtify the mariners in quitting the veſſel, in direct oppoſito the will of their employers. I will not lay it down indefinitely, that they would be bound to wait any length of time, but that, under the circumſtances of this caſe, they ſhould have waited longer. I think the legal caſe and the equitable caſe alſo, as far as it is affected by legal conſiderations only, is with the owners. Adverting to the miſapprehenſion that ſeems to have prevailed on this point, ſeeing that it is a caſe very different from malicious deſertion, and that the mariners might perhaps be miſled by the maſter, I would wiſh to recommend their claim to the liberal conſideration of their employers. But the ſentence which I feel it my duty to pronounce is, that the mariners have failed in their caſe, and that they are not entitled to their wages.

THE VREEDE, OHLSEN.

June 12th, 1804.

Further proof—Rule as to the nature of proof—Correſpondence with the conſignee, when required.

THIS was a caſe of a claim on farther proof for a parcel of goods taken on a voyage from *Amſterdam* to *Bilboa*, and claimed by a merchant at *Embden*. In objection to the further proof, it had been contended, that no correſpondence had been exhibited with the conſignee; that where the claimant appeared to be engaged in a trade not connected with his own port, in either term of it, he ought to clear away the ſuſpicion ariſing from the increaſed improbability of ſuch a tranſaction, by ſhewing the meaſures which he had taken for the protection of his intereſts, in the port of conſignment.

JUDGMENT.

Sir William Scott.—The general rule has been, that where the ſhipment is from the port of one enemy to the port of another enemy, a double correſpondence ſhould be exhibited, becauſe there is a double intereſt to be rebutted; where the trade is from the port of the enemy to a neutral port, (*a*) the correſpondence with the ſhipper is all that is uſually required; and I ſee nothing in this caſe that ſhould induce the Court to direct a ſtricter proof that is ſatisfactory in ordinary caſes. With regard to this particular trade, alſo, I think, the ſuſpicion is much weakened, by conſidering that *Spain* is not a country of much ſhipping, and therefore when the ordinary courſe of ſupply is interrupted on the part of the *Dutch*, it was not very likely to be taken up wholly by *Spain*, but might be ſuppoſed more naturally to engage the attention of neutral merchants.

Objection over-ruled—Reſtitution.

(*a*) *Spain* was at the time of this tranſaction a neutral ſtate.

June 12th, 1804.

THE CATHARINA ELIZABETH, Le Grange.

Reſiſtance by an enemy-maſter will not affect the cargo, being the property of a neutral merchant.

THIS was a caſe of a claim for goods, as *American* property, on board a *French* veſſel, againſt which it had been contended, amongſt other arguments on the proof of property, that there had been a reſiſtance on the part of the maſter that would expoſe the whole cargo entruſted to his management to condemnation.

JUDGMENT.

Sir William Scott.—The circumſtances of this caſe cannot, I think, be taken to raiſe the queſtion reſpecting the reſcue. The ſhip was a *French* veſſel, and the maſter a *French* man; therefore be his conduct what it may, it would be the conduct of an enemy, and not of a neutral maſter. The documents are in ſome parts defective, and may on that account juſtify a call for farther proof; but beyond this, that there is any ground for condemnation of the cargo, in the conduct of the maſter, cannot be maintained. It could only be the hoſtile act of a hoſtile perſon, who was priſoner of war, and who, unleſs under parole, had a perfect right to attempt to emancipate himſelf by ſeizing his own veſſel. If a *neutral maſter* attempts a reſcue, he violates a duty, which is impoſed upon him by the law of nations, to ſubmit to come in for enquiry, as as to the property of the ſhip or cargo; and if he violates that obligation by a recurrence to force, the conſequence will undoubtedly reach the property of his owner; and it would, I think, extend alſo to the confiſcation of the whole cargo entruſted to his care, and thus fraudulently attempted to be withdrawn from the rights of war. With an enemy maſter, the

caſe

The CATHARINA ELIZABETH.

June 12th, 1804.

case is very different: No duty is violated by such an act on his part—*lupum auribus teneo*, and if he can withdraw himself, he has a right so to do. But a material fact in this case is, that the master did not attempt to withdraw this property; he seized the *ship of the captor*, and not this vessel. The case being clear, then, as to the rescue, it is merely a case for farther proof, and if the goods are shewn to be *American* property, they must be restored.

BOEDES LUST, SYBRANDS.

July 24th, 1804.

National character of persons settled in *Demarara*, during *British* possession, as to property taken before the declaration of *Dutch* hostilities, 16th *June*, in 1793.

THIS was the case of a claim given for property belonging to persons resident at *Demarara*, on a suggestion that they were at the time of seizure, and of adjudication, *not* enemies of the Crown of *Great Britain*.

On the part of the Captors, the King's Advocate, Swabey, and Parsons.—This property was seized 19 *May*, 18 3, after the order for the detention and seizure of all *Dutch* property. It is not averred on the part of the claimant that he settled in *Demarara* during the time of *British* possession, so as to bring him within the range of the principle which the Court laid down in the Case of the *Diana*. (*a*) Neither is it attempted to be shewn, that at the time of capture, the claimant had manifested by any overt act an intention of quitting the colony. Much property in the situation of this claim has been condemned since the commencement of the war; and it seems entirely to have escaped the Counsel and the Court, that there

(*a*) Supra, page 601

was

The Boedes Lust.

July 24th, 1804.

was any ground for reſtitution. Such a claim is therefore not only unprecedented, but in oppoſition to the practice which has prevailed, from which ſome inference at leaſt ariſes againſt the ſoundneſs of the pretenſions on which it is built. It is now, however, brought forward for ſolemn argument on this ground, that the claimant was not an *enemy* either at the time of ſailing, or at the time of capture, or at the time of adjudication. With regard to the firſt point, it is certainly not neceſſary that property, to become good prize, ſhould be the property of the enemy at the time of ſailing. If ſo, every thing found upon the ſeas at the breaking out of hoſtilities, though belonging to the enemy, would be protected. 2dly. It is not neceſſary that it ſhould be the property of the enemy at the time of ſeizure; for if ſo, no property ſeized under *embargo* could be condemned. 3dly. It is not neceſſary that it ſhould be the property of the enemy at the time of adjudication; becauſe, if that could be maintained, the goods of all perſons who were enemies at the time of capture, but had become ſubjects by conqueſt before adjudication, muſt be reſtored, which is contrary to the eſtabliſhed principle of the (*a*) *Negotie en Zeevart*, the *Danhetar African*, (*b*) and that whole claſs of caſes. It is, however, of leſs importance to dwell on this point, ſince the fallacy of the pretenſion ſeems to lie in confounding the fact, and in conſidering the time of detention only as the time of legal capture. On the contrary, the firſt ſeizure in this inſtance, being only proviſional, the rights of war muſt be taken to have attached on the property, at the moment of actual hoſtilities againſt *Holland*. The rights of his Majeſty ac-

(*a*) Vol. I. p. 107. (*b*) Ibid.

crued

crued at that inſtant, and are not to be diveſted by any ſubſequent character which the claimant may acquire. If the original detention had been merely accidental, and not ariſing out of any proſpect of war, this change of character would have enſued as a neceſſary conſequence of law. In the preſent caſe, this converſion is more immediately pointed out by the directions given by the Crown for the ſeizure. The firſt poſſeſſion was of a hoſtile nature, and if the right of property remained in any manner in ambiguity, till the declaration of hoſtilities, at that inſtant the right of the Crown attached upon it, as upon the property of an enemy, and could not be diveſted by the intervention of any change of character that might take place previous to adjudication. On this principle, the caſes of the *Negotie en Zeevart*, and the *Danbetar African*, are preciſely in point. The latter was ſtill ſtronger, ſince in that caſe the capture was not made till after the proprietor had become a *Britiſh* ſubject by *capitulation*.

The Boedes Lust. *July* 14th, 1804. Ut ſupra.

On the other ſide, Arnold, Laurence, and Robinſon.—The plea on the part of the claimant is, that under all the circumſtances of this caſe, he is entitled to reſtitution. It may not be improper to ſtate briefly, therefore, what the Situation of the Claimant *was*, previous to the actual Seizure, and *what it is* at this preſent time of adjudication. It appears that till *December* 1803, the inhabitants of *Demerara* had continued *Britiſh* ſubjects, as the colony had not been before that time ſurrendered to the *Dutch* under the Treaty of *Amiens*. The property in queſtion was ſhipped in *January* and *February* 1804, and was the produce of the cultivation of the iſland during the time of *Britiſh* poſſeſſion. The ſhip ſailed in *March*, and was captured on the

19th

The Hebes Lust. July 24th, 1804.

19th of *May*, a month before the declaration of war againſt *Holland*. The property was neutral at the time of ſailing, and it would have continued neutral, if it had gone on to the place of its deſtination. At this preſent moment of adjudication, the claimants are become *Britiſh* Subjects. At all the periods, therefore, to which the averment of property is required to point in the affidavit of claim, and in the teſt affidavit, the claimant may conſcientiouſly aver, " that it was his property, at the time of ſailing and ſeizure, that it would have been his property if it had arrived and been delivered at the place of deſtination, that it now is his property, and that it did not, at any of thoſe times, belong to enemies of the Crown of *Great Britain*, or to perſons inhabiting within the territories of the enemy." But the effect of this averment is endeavoured to be avoided, by ſubſtituting in the place of the actual ſeizure another point of time as the time of capture, viz. the moment of the declaration of hoſtilities. But how does this conſiſt with the general underſtanding of the practice of the Court? It can hardly be doubted, that in the teſt affidavit before alluded to, the obvious meaning of the terms is the ſenſe in which they are to be underſtood. The averment of property, as there introduced, is intended principally to negative the ſuppoſition of fraud or colluſive transfer, ſubſequent to the ſailing; it is meant to cover the period of the voyage, and therefore in that inſtrument at leaſt the time of capture is to be taken ſimply as the time of actual ſeizure, and not conſtructively, and with reference to proceedings in this Court, or other ſubſequent events. It may be ſaid, that that inſtrument is formed principally with a view to captures in a ſtate of actual war, and therefore

The Bordes Lust. July 24th, 1804.

fore that it will not apply to illuſtrate a queſtion ariſing under embargo. But the opinion of the Court has been already expreſſed againſt the ſufficiency of ſuch a conſtructive meaning. Under the old practice, the form of condemnation ran "as "enemy's property *at the time of ſeizure and adjudi-* "*cation.*" During the laſt war, when it became neceſſary to apply the form to property ſeized under embargo, the Court thinking that the old form did not properly *apply*, and that the terms "*enemy's property* at "the time *of ſeizure,*" could not be predicated of it in virtue of the declaration of hoſtilities that afterwards took place, directed the form to be altered to "*the property of perſons now become enemies,*" &c. This circumſtance ſhews at leaſt that it was thought deſirable that it ſhould appear on the Records of the Court, that at one of theſe periods, according to their obvious meaning, the property was the property of an enemy. Indeed the fallacy of the argument on the other ſide ſeems to lie in arguing, that becauſe neither period is ſeparately neceſſary, therefore no *one of them is neceſſary*. But ſuppoſe the ſame reaſoning ſhould be carried on to all other times, precedent and ſubſequent, then the argument would be, that becauſe it could not be ſaid to be neceſſary to be ſhewn that it was the property of an enemy at any one preciſe moment, therefore it was not neceſſary that it ſhould have been ſo at any time whatever. On the contrary, it ſeems to have been thought ſufficient hitherto in the adminiſtration of prize law, to give the captors the chances of the tables, as it may be called, ſo that if at one of ſeveral times, the property can be ſhewn to belong to the enemy, it would be ſufficient; but *ſo much* has always been

The Bozdes Lust.

July 24th, 1804.

been required, and no case can be produced in which condemnation has passed otherwise. The cases that have been cited by no means contradict this assertion. In the *Negotie en Zeevart*, the declaration of hostilities had been previous to the *sailing of the vessel*, and the *principle* decided was, that the impression of enemy's character could not be removed *in transitu*, not even by an intermediate capitulation. In this case, up to the moment when the vessel was seized, there had been no enemy's character imposed, and if at that moment the case had been brought to adjudication, on what principle could it have been denied that the claimant would have been entitled to restitution. The *Negotie en Zeevart*, therefore, stood on a principle which is not raised by the facts of this case. The *Danbetar African* stood upon the same ground, supported by the particular *circumstances* preceding the late hostilities with *Holland*. The state of *Holland* was pronounced to have been *hostile* at the time of sailing, *May* 1795, and the express words of the sentence were, that the subsequent declaration of hostilities in *September* 1795, as applied to the ambiguous state of affairs for several months preceding, must be construed to have a retroactive operation. This construction was, indeed, justly raised by the words of the declaration of hostilities, which began by reciting, "that whereas, for several months, the *French* have been in possession of *Holland*," &c. Here no such state of ambiguity had preceded. The relation of the two countries was a state of clear amity till the 16th of *June*. In such a case, the equity of interpretation requires that whatever force is given to the intervention of temporary hostilities, not less effect should be ascribed to the state of amity intervening

vening alſo before adjudication, to rehabilitate and reſtore the claimant to his former friendly character; and ſo material is this diſtinction againſt the application of the authority of the *Danquebar Africaine*, that it turns the caſe in favour of the preſent claim, as applied to the circumſtances on which it is founded. Becauſe in the ſubſequent caſe of the *Herſtelder*, (a) when the Court came again to advert to the circumſtances of the *Danbetar African*, it obſerved, "that, in that caſe, the ſhip ſailed before hoſtilities, and if the ſtate of *Holland* had been in a clear and decided character of amity towards *Great Britain*, I ſhould have held, that the party would have been entitled to reſtitution, and to the benefit of the principle, that the national character *cannot be changed in tranſitu.*" That is, therefore, a direct declaration in favour of this claim, that the claimant being clearly in amity at the time of ſailing, not hoſtile at ſeizure, and not debarred from receiving reſtitution by the character of enemy at the time of adjudication, may be conſidered as a perſon entitled to reſtitution. The whole of the argument on the other ſide depends on fixing upon one intervening circumſtance, which, it is inſiſted, muſt apply proſpectively as well as retroſpectively to defeat every other conſideration. Becauſe hoſtilities have intervened, it is contended, that a right of war has attached, which cannot afterwards be diveſted. But ſurely the equity of the principle requires, that if the intervention of hoſtilities between actual ſeizure and adjudication, can convert the character of the property, ſo as to render it liable to be conſidered as hoſtile property, the return of character to its neutral ſtate, recurring alſo on the ſame intermediate period, ſhould have the effect of *rehabilitation*, and reveſt the title of property and

The Boedes Lust.

July 14th, 1804.

(a) Vol. I. p. 113.

The Boedes Lust.

July 24th, 1804.

and the capacity to receive reſtitution, which had been ouſted only by conſtruction and by anticipation of the rights of war. Such a latitude may well be allowed till the ſentence of adjudication has found the fact, and decided the character in which the claimant is to be conſidered. Till that is done, all the proceedings are inchoate only, and if the fact fails which they tend to eſtabliſh, they can have no effect to controul the change of circumſtances, and prevent the Court from deciding upon them as they ſtand in evidence at the time of adjudication. But farther, the whole argument on the ſide of the captors is built on *conſtruction*, which, if it is admitted as to the point of time, why may it not be extended to the conſideration of character alſo, and entitle the claimant to the benefit of all that conſtructive reaſoning on which the principle of poſſliminary reſtitution is founded? The inhabitants of *Demerara* may well claim the liberty of appealing from their political denomination at the time of capture, to their intention of removing themſelves from the ſituation of enemies, and of again incorporating themſelves with *Great Britain*. This has been allowed to individuals in the caſe of Mr. *Curtiſſos* (*a*) and others, who have been in the country of the enemy at the time of capture. In thoſe caſes it may be ſaid, that ſome overt act of removal, has been required. That indeed can hardly happen in a caſe of a colony; but it is immaterial, ſo long as ſuch an intention can be ſhewn to be ſo connected with the contingency of war, as to have followed as a neceſſary conſequence on that event. The ſituation and conduct of the inhabitants of *Demerara* may well ſupport ſuch a concluſion. In general deſcription

(*a*) Vol. III. p. 16. 21.

ſcriptions of that ſettlement, it appears, that the principal plantations were, previous to the laſt war, in the occupation of *Britiſh* planters from the other *Britiſh* iſlands. During a conſiderable part of the laſt war they were identified with the *Britiſh* empire, and may be ſuppoſed to have acquired affections, connections, and habits, which would lead them to put themſelves again under the dominion of this country. Theſe preſumptions would indeed be nothing, without the fact itſelf. But the event proved them reaſonable, and may be juſtly put in compariſon with any overt act, that can be required or proved on the part of individuals. The war was ſcarcely known there till the middle of *Auguſt*; ſo ſoon as the 19th of *September*, without the interpoſition of any force, the iſland voluntarily ſurrendered to this Country, and the inhabitants became again *Britiſh* ſubjects. On theſe grounds alone, it might not be too much to contend, that the claimants are entitled to the benefit of the Poſtliminary principle. On the whole caſe it is ſubmitted, that either the ordinary technical deſcription of neutral character, or the particular claim ſpringing from the relation which the claimants bear to this country, as redintegrated *Britiſh* ſubjects, might be ſufficient to ſupport the reſtitution of this property. But the force of the pretenſions of the claim will be materially increaſed, if it is conſidered on theſe grounds jointly, that the perſon before the Court has complied with all the terms uſually required of claimants to ſhew themſelves qualified to reſtitution, both at the time of ſeizure and adjudication; that they are moreover perſons, who were almoſt to the eve of capture *Britiſh* ſubjects, exporting the produce of *Britiſh* cultivation, and ſtanding here at the time of adjudication,

The Bosdes Lost.

July 24th, 1804.

reſtored again by their own voluntary act, upon the firſt news of hoſtilities, to their connexion with the *Britiſh* empire.

In reply, the King's Advocate, Swabey, and Parſons.— The affidavit of claim is introduced only to defeat fraudulent transfers; all the periods therein ſtated may be ſafely predicated in many inſtances, in which, notwithſtanding, the property will be liable to condemnation. Even of theſe periods there is one, at which the character of enemy moſt unqueſtionably attached; viz. at the time of inſtituting proceedings by taking out the monition. That act is the foundation of the whole enquiry. The evidence introduced to ſupport the proceedings relates to the ſtate of things, *at that time*, and *previous*; and *to* that time, muſt be referred the retroſpective operation of the ſentence, which afterwards paſſes. This would be the legal view in which the effect of a condemnation muſt be conſidered, if ſuch a ſentence were neceſſary to veſt *the right*, but it cannot be ſo held; a ſentence of condemnation is a meaſure of convenience declaratory of the fact, but not eſſential to convert the right of property, which accrues to the King *jure belli*, at the inſtant of capture. Something has been thrown out as if at the time of capture this property might have been reſtored; but it is to be remembered that the order for the ſeizure of *Dutch* property iſſued *May* the 16th, at the ſame time with the delaration of war againſt *France*. After that order, it would have been the duty of the Officer of the Crown in this Court to have reſiſted reſtitution, until the conduct of *Holland*, and her diſpoſition, or power to maintain the relations of amity with this Country, during the war with *France*,

France, ſhould be more fully aſcertained, and till farther directions of the Crown on that point ſhould be received. During the uncertain ſtate of affairs between this Country and *Holland*, the firſt order for ſeizure was proviſionally of a hoſtile nature; and therefore after all that has been ſaid of the terms of the ſentence, there would be no impropriety if the old form was *retained*, and if this property was deſcribed as the property of the enemy at the time of ſeizure. But all the argument from the form of ſentence ſhews only, that the Court is not bound down by any particular form, but that it adapts the ſentence to the ſtate of facts, as in the caſes of the late war, the ſentence was altered, "*to the property of perſons now become* "*enemies, &c.*" The ſubſtantial ground of enquiry is—Whether there was not ſuch a hoſtile character in the firſt ſeizure, and confirmed by the declaration of hoſtilities, as would veſt the right in the King, at the time of the commencement of theſe proceedings. At that moment there could have been no queſtion as to the condemnation. The claimant could have had no *perſona ſtandi* before the Court, and the property muſt have been condemned. Since that time the proceedings have been deferred, to give all parties an opportunity of being heard; but it would be very unreaſonable that the right of action ſhould, owing to that indulgence, be altered by the intervention of ſubſequent events. To one queſtion which has been mooted in argument,—Whether in the caſe of a ſeizure before hoſtilities, in which no proceedings may be ſuppoſed to have taken place during the war, the Court would proceed after the return of peace.—The practice of the Court will afford an anſwer; for in ſome of the

The Boedes Lust.

July 24th, 1804.

caſes ſeized before the late war with *Holland*, and ſuſpended by accident during the war, the Court has granted its monition, and permitted proceedings to be inſtituted and proſecuted to condemnation ſince the return of peace. As to the caſes which have been commented upon, it is impoſſible to diſtinguiſh them, but to the diſadvantage of the preſent claim. They are ſtronger in regard to *time*. The *Herſtelder* was taken before hoſtilities, but after a ſpecial invitation to all ſubjects of *Holland*, which has not taken place here. The dictum in the *Herſtelder* was ſpoken of the *Dankebar*, which was not captured till after the claimant had become a *Britiſh* ſubject; yet in that caſe alſo, it was held that the character could not be changed *in tranſitu*.

JUDGMENT.

Sir William Scott.—This caſe comes on upon the claims of perſons reſident in *Demarara* before the war, and at the time of capture, and I cannot but ſay that I am glad that the queſtion has been raiſed, ſince it may have the effect of putting an end to much uncertainty on the part of perſons who, on various grounds, may think themſelves entitled to more favourable conſiderations, than the rules of law preſcribe for ordinary caſes. The claim is given for ſeveral perſons as inhabitants of *Demarara*, not ſettling there during the time of *Britiſh* poſſeſſion, nor averring an intention of retiring when that poſſeſſion ceaſed. They are therefore to be treated under this general view as *Dutch* ſubjects, unleſs it can be ſhewn that there are any other circumſtances by which they are protected. It is contended, that there are ſuch circumſtances, and that

The Boedes Lust. July 24th, 1804.

that they are theſe: That the property was taken in a ſtate of peace, and that the proprietors are now become *Britiſh* ſubjects, and conſequently that this property could not be conſidered as the property of an enemy, either at the time of capture or adjudication. Now, with reſpect to the firſt of theſe pleas, it muſt be admitted, that alone would not protect them, becauſe the Court has, without any exception, condemned all other property of *Dutchmen* taken before the war—And upon what ground?—That the declaration had a retroactive effect, applying to all property previouſly detained, and rendering it liable to be conſidered as the property of enemies taken in time of war. This property was ſeized proviſionally, an act itſelf hoſtile enough in the mere execution, but equivocal as to the effect, and liable to be varied by ſubſequent events, and by the conduct of the Government of *Holland*. If that conduct had been ſuch as to re-eſtabliſh the relations of peace, then the ſeizure, although made with the character of a hoſtile ſeizure, would have proved in the event a mere *embargo*, or temporary ſequeſtration. The property would have been reſtored, as it is uſual, at the concluſion of embargoes; a proceſs often reſorted to in the practice of nations, for various cauſes not immediately connected with any expectations of hoſtility. During the period that this embargo laſted, it is ſaid, that the Court might have reſtored, but I cannot aſſent to that obſervaſion; becauſe, on due notice of embargoes, this Court is bound to enforce them. It would be a high miſpriſion in this Court, to break them, by re-delivery of poſſeſſion to the foreign owner of that property, which the Crown had directed to be ſeized and detained for farther or-

The Boedes Lust. July 24th, 1804.

ders. The Court acting in purſuance of the general orders of the State, and bound by thoſe general orders, would be guilty of no denial of juſtice, in refuſing to decree reſtitution in ſuch a caſe, for it has not the power to reſtore. Its functions are ſuſpended by a binding authority, and if any injuſtice is done, that is an account to be ſettled between the States. The Court has no reſponſibility, for it has no ability to act.

This was the ſtate of the firſt ſeizure. It was at firſt equivocal; and if the matter in diſpute had terminated in reconciliation, the ſeizure would have been converted into a mere civil embargo, ſo terminated. That would have been the retroactive effect of that courſe of circumſtances. On the contrary, if the tranſactions end in hoſtility, the retroactive effect is directly the other way. It impreſſes the direct hoſtile character upon the original ſeizure. It is declared to be *no embargo*, it is no longer an equivocal act, ſubject to two interpretations; there is a declaration of the *animus*, by which it was done, that it was *done hoſtili animo*, and is to be conſidered as an hoſtile meaſure *ab initio*. The property taken is liable to be uſed as the property of perſons, treſpaſſers *ab initio*, and guilty of injuries, which they have refuſed to redeem by any amicable alteration of their meaſures. This is the neceſſary courſe, if no particular compact intervenes for the reſtitution of ſuch property taken before a formal declaration of hoſtilities. No ſuch convention is ſet up on either ſide, and the State, by directing proceedings againſt this property for condemnation, has ſignified a contrary intention. Accordingly the general maſs of *Dutch* property has been condemned on this retroactive effect; and *this* property

perty ſtands upon the ſame footing as to the ſeizure, for it was ſeized at the ſame time, and with the ſame intent. There is no ground of diſtinguiſhing the time of ſeizure, between theſe claims and former caſes of a ſimilar nature; it was a proviſional ſeizure in all, declared to be hoſtile by ſubſequent events, acting in a reflex manner upon all the property then ſeized, and declaring it to be *all* enemy's property, unleſs ſome circumſtances can be ſhewn to take theſe particular claims out of the common operation.

At the time of the declaration of hoſtilities, then, this property ſtood exactly on the common footing; and the reſult of any proceeding then pronounced, muſt have been a ſentence of condemnation: It lay open to the ſame legal concluſion at that time, but the Settlement has ſince ſurrendered to the *Britiſh* arms, and the parties are become *Britiſh* ſubjects; and this, it is ſaid, takes off the hoſtile effect, although it might have attached. This argument, to be effective, muſt be put in one of theſe two ways, either that the condemnation pronounced upon *Dutch* property went upon the ground that, though ſeized in time of neutrality, it could not be reſtored *only*, becauſe the parties were not now in a condition to receive it; or elſe, that though ſeized at a time, that may to ſome effects be conſidered as time of war, yet the ſubjects, having become friends, are entitled to reſtitution. This latter poſition cannot be maintained for a moment. It is contradicted by all experience and practice, even in the caſe of thoſe who had an original *Britiſh* character. In the caſe of Mr. *Whitehead*, who had but juſt ſet his foot on the colony of an enemy for a few hours, but was proved to have gone there for the purpoſe of ſet-

The Boedes Lust. July 24th, 1804.

tling, his property was condemned, although at the time of adjudication he was again become a *Britiſh* ſubject, by the ſurrender of *St. Euſtatius* to the *Britiſh* forces; and where property is taken in a ſtate of hoſtility, the univerſal practice has ever been to hold it ſubject to condemnation, although the claimants may have become friends and ſubjects prior to the adjudication. The plea of having again become *Britiſh* ſubjects, therefore, will not relieve them, and the other ground muſt be reſorted to. That is equally untenable in point of fact; for the condemnation of the other *Dutch* property proceeded on no ſuch ground as the mere incapacity of the proprietors to receive reſtitution. It proceeded on the other ground, which I have before mentioned, the retroactive effect of the declaration, which rendered their property liable to be treated as the property of enemies at the time of ſeizure. The reaſonings of the Court have been founded upon that principle. Property is, indeed, frequently condemned upon the other ground of incapacity to claim, where it is accidentally found in *Britiſh* poſſeſſion, before the breaking out of hoſtilities; but where it is ſeized by an order of ſtate, acting proviſionally in contemplation of hoſtilities, the declaration produces ſomething more than a proſpective, future, perſonal incapacity to claim. It decides upon the character of the property already ſeized, and on the nature and quality of the ſeizure. I am of opinion, therefore, that when it is aſſumed, that the capture is legally to be conſidered as made in time of peace, the argument legally fails, becauſe in all legal view of the matter, it is taken in hoſtility; it is rendered enemy's property at the time of ſeizure, by the

The Bordes Lust. July 24th, 1804.

the neceſſary and general retroaction of the ſubſequent declaration of hoſtilities. The whole foundation of the argument, therefore, is defective in the fact. We diſtinguiſh, it is true, as between the different intereſts to which ſuch prize enures, whether it is taken before or after the declaration. That is a matter of ſubſequent and domeſtic regulation, but not influencing the general queſtion of prize. If I am right in this opinion, it is quite unneceſſary to diſcuſs many queſtions which have entered into the debate; Whether the deſcription of property comes within the periods of the teſt affidavit or not, will be perfectly immaterial. Nothing is more clear to my apprehenſion, than that the reference to thoſe periods is not preſcribed as the conſtituent and the diſtinguiſhing qualification of property, but merely for the purpoſe of aſcertaining a clearer view of the general facts reſpecting that property—For inſtance, as to the firſt periods, the time of ſhipment, no body can ſuppoſe, that the time of ſhipment can be there introduced for any other purpoſe than that of bringing out the whole detail of facts, it being perfectly clear that it is in no degree neceſſary, that it ſhould be enemy's property at the time of ſhipment, to ſubject it to condemnation. It is equally immaterial to look to the ſtyle of the ſentence, for that has accommodated itſelf according to the diſcretion of the Court, to correſpond with the facts. The Court is under no neceſſity of referring to any period of time, in the deſcriptive language applying to the property or to the parties. If the Court is legally ſatisfied that it is liable to be condemned as enemy's property, there is no occaſion to expreſs in the conſtruction

The Betsey Lost.

July 24th, 1804.

ſtruction of the ſentence, the particular time at which the liability attached.

With as little effect can it be contended, that a Poſtliminium can be attributed to theſe parties. Here is no return to the original character, on which only a *jus poſtliminii* can be raiſed. The original character, at the time of ſeizure and immediately prior to the hoſtility which has intervened, was *Dutch*. The preſent character which the events of war have produced, is that of *Britiſh* ſubjects; and though the *Britiſh* ſubject might under circumſtances acquire the *jus poſtliminii* upon the reſumption of *his native* character, it never can be conſidered that the ſame privilege accrues upon the acquiſition of a character totally new and foreign. As to more popular topics to which recourſe has been had, I ſhall leave them to their operation in that quarter, where only they can have a proper effect. It is my duty, in the preſent caſe, to apply the principles of a law not very lenient. How far it may be proper to relax the rigour of ſuch an application, will be beſt conſidered by thoſe who have more latitude of judgment, as well as a wider ſphere of political information and knowledge. It may be fit in that ultimate and ſuperior conſideration, to refer ſtill farther back to the former condition of the Claimants, as *Britiſh* ſubjects, during a conſiderable period of the late war, and down to a time but ſhortly antecedent to the ſhipment of theſe goods. It may be fit to look to the affections and diſpoſitions of the colony; though every ſurrender of war muſt be legally conſidered as the effect of mere force. It may be fit to conſider that the property belongs to thoſe, who are now entitled

to the character of *Britiſh* ſubjects. Theſe conſiderations may have their ſeparate, or their united influence upon that ultimate judgment to which the law refers the diſpoſal of property captured prior to hoſtilities. They could only miſlead me, from the execution of my duty, which is ſimply to pronounce that the property, at the time of the capture, belonged to ſubjects of the *Batavian* Republic, and is as ſuch or otherwiſe liable to confiſcation.

The Bordes Lust. July 24th, 1804.

THE ABBY, Murchy.

July 26th, 1804.

Trade with the enemy, on an adventure originating before the war, *but not ſtopt on notice of hoſtilities*—Imputation removed by the *Portus ad quem*, becoming *Britiſh* before the *arrival* of the veſſel.

This was a caſe of a ſhip belonging to Mr. *Dawſon*, a *Britiſh* ſubject, that had ſailed from *Liverpool* to the coaſt of *Africa*, on the 11th *September* 1795, with an ulterior deſtination to the iſland of *Demarara*. On the voyage to the *Weſt-Indies*, ſhe was captured and carried into *Martinique*, and proceeded againſt, firſt in the Prize Court, but afterwards by libel, in the Revenue Court of Admiralty, for a violation of the Navigation Laws. On this proceeding the veſſel was condemned. On appeal it was found that the Vice-Admiralty Court of *Martinique* had no juriſdiction, over an offence committed in violation of the Revenue Laws, in another iſland. But at the time when the cauſe would have been remitted to await the iſſue of the prize proceedings that had been inſtituted, the Vice-Admiralty Court of *Martinique* was aboliſhed. The cauſe was now brought to the High Court of Admiralty, on a ſuggeſtion that the ſhip was ſubject to condemnation in the Prize Court, as a *Britiſh* ſhip taken in a trade with the colony of the enemy.

On

The ABBY.

July 16th, 1804.

On the part of the claimant, Laurence contended That the Court had no juriſdiction—That the prize ſuit had been inſtituted and abandoned, and therefore that it was on that point a *res adjudicata*—That as to the revenue ſuit, *that* had been pronounced a nullity, and therefore if it was taken up again, it muſt commence *de novo* as an original ſuit; whereas the juriſdiction of the High Court of Admiralty, as to the offences againſt the revenue laws in the *Weſt Indies*, was only an appellate juriſdiction. 2dly, It was contended, as to the merits of the prize queſtion, that it could not be deemed a trading with the enemy, ſince the ſhip ſailed before the breaking out hoſtilities againſt *Holland*, and before the parties could have any knowledge of that event; and that at the ſuppoſed time of arrival, *Demarara* had become a *Britiſh* ſettlement.

JUDGMENT.

Sir William Scott.—The queſtion ariſes on the property of Mr. *Dawſon*, who fitted out this veſſel for a voyage to *Africa*, there to barter her cargo for ſlaves, and then to carry them to the iſland of *Demarara*, at that time a *Dutch* colony. The veſſel ſailed on the 11th of *September* 1795. At that time, and until the declaration of hoſtilities, which iſſued on the 16th of that month, *Demarara* could not be conſidered as the colony of the enemy; it would be impoſſible for me to ſay, therefore, that it was an illegal trade at that time, as a trade to the colony of the enemy, becauſe there was no ſtate of hoſtility. The order for the detention of *Dutch* property had paſſed indeed, but that was an equivocal act, which might terminate amicably, and cannot be taken as fixing on the party an intention

The ABBY.

J. 26th, 1804.

intention of trading with a declared enemy. Soon after the ſailing of the veſſel, the declaration of hoſtilities took place, viz. on the 16th of *September* 1795; and if the ſhip had been taken on a voyage to a colony now become an Enemy, the Court would have required it to be ſhewn, that due diligence had been uſed to alter the voyage, and to exonerate the claimant from the charge of an illegal trading with the enemy. The veſſel ſailed from the coaſt of *Africa*, in *May* 1796, and was taken off the iſland of *Demarara*, after the ſurrender of that iſland to the *Britiſh* forces, and carried to *Martinique*. There the proceedings were firſt inſtituted in the Prize Court, though it does not clearly appear on what grounds; during thoſe proceedings a libel was given, as in a revenue cauſe, the prize ſuit was ſuſpended, and the ſhip was condemned for a breach of the revenue laws. The caſe came up on appeal before the Privy Council, where it was found that the former proceedings in *Martinique* were a nullity, as the Vice-Admiralty Court of that iſland had no juriſdiction over a breach of the revenue laws committed in another colony. The regular mode would then have been to have ſent back the cauſe to the Prize Court, where proceedings had firſt been inſtituted, but that Court was annihilated. The caſe was therefore brought before this Court, as it has been done in two or three inſtances (*a*) of a ſimilar nature, where it has become neceſſary to carry into effect the proceedings of Vice-Admiralty Courts that have been aboliſhed. It is now objected to the claim, that the party has ſtated himſelf out of court on two grounds: 1ſt, On the ground of trading with the enemy if *Demarara* was a *Dutch* colony, and on the ground of an illegal importation

(*a*) Piciments, vol. iv. p. 360.

The ABBY.

July 26th, 1804.

importation if that iſland was to be conſidered as a *Britiſh* ſettlement. With regard to the firſt objection, I conceive that there muſt be an *act of trading to the Enemy Country*, as well as the intention. There muſt be, if I may ſo ſpeak, a legal as well as a moral illegality. If a man fires a gun at ſea, intending to kill *an Engliſhman*, which would be legal murder, and by accident does not kill an *Engliſhman*, but an enemy, the moral guilt is the ſame, but the legal effect is different. The accident has turned up in his favor—the criminal act intended has not been committed, and the man is innocent of the legal offence. So, if the intent was to trade with an enemy (which, I have already obſerved, cannot be aſcribed to the party at the commencement of the voyage, when hoſtilities were not yet declared), but at the time of carrying the deſign into effect the perſon is become not an enemy, the intention here wants the *corpus delicti*. No caſe has been produced in which a mere *intention to* trade with the enemy's country, contradicted by the fact of its not being an enemy's country, has enured to condemnation. Where a country is known to be hoſtile, the commencement of a voyage towards that country may be a ſufficient act of illegality; but where the voyage is undertaken without that knowledge, the ſubſequent event of hoſtility will have no ſuch effect. On principle, I am of opinion, that the party is free from the charge of illegal trading. Then, as to the other ground, there appears to me to have been neither *intention nor act*. The former ſuppoſition of *Demarara* being a foreign colony, rebuts the intention of importing into a *Britiſh* colony, in a manner not authorized by law. Indeed the inſtructions of the maſter "*were to call at Demerara for orders*," which orders

The Ann.

orders muſt have been, *not to deliver there* according to the firſt deſign, but to go elſewhere, ſince the facts on which the ſpeculation was founded had entirely failed; thoſe facts being, that the colony was a *Dutch* (*a*) and neutral colony. There was in fact no actual importation; nor was this, as far as I can perceive, made the ground of condemnation in the Court of *Martinique*, ſince the ſentence ſeems to have gone "upon the act of ſailing without a *Britiſh* regiſter." On both theſe points, therefore, I am of opinion, that the claimant is entitled to the reſtitution of his property. On the firſt there was *no illegal act*; on the ſecond there was neither *intention* nor *act*. On the firſt ground the Court would have expected the party to have exone-

(*a*) Since the deciſion of this cauſe, an objection has been taken to the legality of a trade like the preſent, on the part of *Britiſh* Merchants fitting out from *Britiſh* ports ſlave adventures in foreign bottoms to the colonies of foreign nations, as being in breach of the regulations preſcribed for *Britiſh* trade. This objection has been raiſed principally on the regulations of the 39 *G.* 3. ch. 80. —In the *Ramſdyche*, before the Lords, *March* 1806, ſtill reſerved for judgment, this argument was preſſed. The regulations of the 39 *G.* 3. c. 80. which forbid *Britiſh* ſlave ſhips to be fitted out from other ports except *London*, *Briſtol*, and *Liverpool*, were ſubſequent to the diſcuſſion of this caſe; and therefore the argument in its preſent form did not preſent itſelf. But ſince the trade to the coaſt of *Africa* was thrown open to all *Britiſh* ſubjects, 5 *G.* 3. ch. 44. § 4. ſeveral acts of Parliament have paſſed for the regulation of collateral points, as reſpecting *numbers*, and *the forms to be obſerved, on landing in Britiſh iſlands*, &c. &c. 28 *G.* 3. ch. 54. 29 *G.* 3. ch. 66. 31 *G.* 3. ch. 54. 35 *G.* 3. ch. 90. 37 *G.* 3. ch. 118. In all theſe acts, the terms of the proviſions ſeem to relate only to the regulation of a trade *excluſively Britiſh*, *viz.* To ſhips cleared out as *Britiſh* ſlave ſhips, and deſtined to *Britiſh* iſlands.—The ſame modes of expreſſion are preſerved in the late act, 39 *G.* 3. ch. 80. If the argument, as it now ſtands, is ſuſtainable, it may be a queſtion whether it might not alſo have been applicable to the operation of former acts.

rated

The ABBY.

July 26th, 1804.

rated himſelf from the intention of trading with the enemy, after the knowledge of hoſtilities, if the colony had remained hoſtile. As the colony was not hoſtile at the time of the ſuppoſed importation, I think that is not neceſſary in this caſe, and I ſhall decree the property to be reſtored, on payment of the captor's expences.

Sept. 4th, 1804.

Blockade of *Havre*—Excuſe over ruled—Condemnation.

THE ADONIS, GOTTSCHALK.

THIS was a caſe reſpecting a veſſel captured on the evening of the 13th *July*, ſtanding towards *Havre*, eaſt ſouth eaſt of *Cape Barfleur*, after having been warned by one of the blockading frigates that *Havre* was under blockade. The excuſe offered on the part of the maſter was, that the mate had aſſerted the land to be *Engliſh* land; that the maſter was doubtful as to that fact, and for the purpoſe of aſcertaining it, had continued his courſe towards the land.

JUDGMENT.

Sir William Scott.—In deciding queſtions of this kind, the Court cannot but be ſenſible of its own inſufficiency, on many occaſions, to eſtimate the full effect of the various incidents of navigation, on which the exact truth and juſtice of the caſe may frequently depend. Yet there may be facts ſo ſimple, and decided in their nature, as to remove all doubt, and to impreſs conviction almoſt with perfect certainty. In the preſent caſe, the deſtination is repreſented to have been to *Nantes*; the ſhip was taken very near *Havre*, which is obviouſly not a natural courſe to be purſued for *Nantes;* and therefore the maſter is neceſſarily laid under the obligation of explaining his conduct, and of accounting for the ſituation in which the ſhip

The ADONIS.

September 4th, 1804.

was found. An excuſe is offered; and the Court has to determine, whether the repreſentation now given can be received as credible. The excuſe is, "That on the day before they were taken, they had been ſailing down the *Channel*, and had ſeen the *Engliſh* coaſt; that on the next day they ſaw a projecting land, which the mate took for the Start point, whilſt the maſter aſſerted it to be the *French* coaſt, and ſtood in to determine this fact." I will not take upon myſelf to ſay that ſuch a miſtake might not be poſſible. It might happen, that nothing was viſible but a projecting headland, and that the country behind was not ſo apparent as to ſhew whether it was *French* or *Engliſh* land. I ſhould be unwilling therefore to lay much ſtreſs on that miſtake, though it certainly does not appear to my apprehenſion to be a very probable one. But there is one fact on which I think reliance may more ſafely be placed, and that is, that after the ſhip had ſpoken with an *Engliſh* frigate in the morning, and had had an opportunity of receiving information, the ſame courſe was ſtill continued. The maſter ſays, "that he could not clearly underſtand from the *Engliſh* officer what land it was." If a doubt exiſted in his mind, it is quite impoſſible that he ſhould not have made more particular inquiry, in order to aſcertain, for the intereſt of his employer, whether he was in a proper courſe for *Nantes*; or, whether he might not be near ſome other *French* ports, which he muſt know to be interdicted. This would have been the natural conduct, if a doubt had really been entertained; and it could ſcarcely be queſtioned, that the *Engliſh* frigate was fully competent to give the neceſſary information. No application of this kind was made; but

The ABBY.

July 26th, 1804.

rated himſelf from the inten[illegible] to, and warned in the enemy, after the knowle[illegible] cutter was out of ſight, lony had remained h[illegible] the *French* coaſt, and was hoſtile at the time of [illegible] another *Engliſh* cutter ſteering that is not neceſſa[illegible] bay of *Havre*; and when property to be [illegible] "how he came there," the only expences. [illegible] wanted to be better acquainted with [illegible] Is that a ſufficient reaſon?—or is [illegible] of this veſſel ſo entirely at variance [illegible] bility, and with all notions of common

Sept. 4th, 1804.

Blockade of *Havre*—Excuſe ever ruled—Condemnation.

T[illegible] as to make it almoſt impoſſible, that the [illegible] be brought into ſuch a ſituation, but for [illegible] ſiler purpoſe. Even here again, I will not [illegible] at it is abſolutely impoſſible, that the maſter have acted in this very weak and fooliſh manner, merely through extreme indiſcretion. But if the owner truſts his property to the care of ſuch a perſon, he muſt be held anſwerable in ſome degree, for his prudence, as well as for his integrity. If the maſter has acted in ſuch a manner, as cannot for the ſafety of other caſes be admitted to proceed from juſtifiable ignorance, his principal muſt take the conſequences of his imprudence. The excuſe ſet up is incredible in itſelf, and is practically inconſiſtent with the maintenance of the blockade, and I reject the claim.

On the cargo, which was reclaimed for other perſons than the owner of the ſhip, the King's Advocate contended—That the preſumption from the conduct of the ſhip applied alſo to the cargo, ſince it was not to be ſuppoſed that the maſter could have had any view in the fraudulent deviation of which he now ſtood convicted, but for the ſervice of the owner of the cargo.

On

ide, *Laurence and Robinſon*, contended ption, however ſtrong, was only a evidence which might be counteracted oof. That the maſter was not *de jure* the the owner of the cargo; and therefore that ourt could not find the ſame ſatisfaction in conding the claim of the proprietor on the principle of legal reſponſibility, on which conſiderable ſtreſs had been laid in the ſentence of the ſhip. That, allowing the ſuppoſition of a fraudulent colluſion on the part of the owner of one part of a cargo, there might yet be other owners of other parts, who were not acquainted with the fraud, and who relied only on the general repreſentation of the voyage, and could not therefore be fairly precluded by the actions of other individuals, as creating concluſive preſumption againſt them. From this conſideration, it would appear how unfit the preſumption ariſing from the conduct of the veſſel alone was, to be preſſed beyond its juſt rate as matter of evidence, or to work a peremptory concluſion in ſuch caſes.—Judgment reſerved.

On the next day, Sept 5th.

Sir William Scott.—This is a caſe in which I have taken ſome ſhort time to deliberate, being unwilling to preſs with any degree of unneceſſary ſeverity, the effect of preſumption againſt this claſs of caſes more eſpecially, becauſe it is one in which the principle of law, though unqueſtionably built upon the juſt rights of war, muſt be allowed to operate with ſome hardſhip upon neutral commerce; and becauſe it is a claſs of caſes, on which the Court has little authority to reſort to, but has to collect the law of nations from ſuch ſources, as reaſon, ſupported in ſome ſlight de-

The ADONIS.

September 4th, 1804.

gree by the practice of nations, may appear to point out. In the preſent caſe, it is now to be aſſumed, that the ſhip was taken in a courſe to *Havre*. I collect that from the ſtrange and incredible account of the maſter, which, I have already ſaid, in my opinion, cannot be true. It is to be inferred alſo, I think, that the maſter was induced to make this deviation from ſome ſiniſter intention; and I may be warranted to preſume, that all this would not have been reſorted to, but in the ſervice of the cargo. It has happened in other blockade caſes, that excuſes have been ſet up from want of water and proviſions, or from other occaſions; but when the Court pronounces theſe excuſes to be not real, a preſumption *neceſſarily* ariſes that it was for the delivery of the cargo, that ſuch a fraud had been attempted; ſince there is ſcarcely any other adequate motive which can be ſuppoſed to induce a maſter to hazard the intereſts of his veſſel; the motives which he has aſſigned being demonſtrated to be falſe. There is a preſumption alſo in ſuch caſes, that this is done with the knowledge, and at the inſtigation, of the owner of the cargo; becauſe although it is not an impoſſible thing that maſters may be guilty of barratry, it is not a natural conduct, nor what is gratuitouſly to be ſuppoſed. Theſe are, I think, juſt inferences; and the only queſtion can be as to the effect of the preſumption ariſing from them, whether it ſhall exclude all contrary averment, or whether it ſhall operate only as matter of evidence, in concurrence with other proof, as to the guilt of the intention. It muſt undoubtedly *bind* the owner; but the queſtion is, whether it ſhall do ſo *preſumptively, or concluſively*; and whether the party ſhall be let in to prove a contrary intention. I am of opinion that he cannot. I will

will not say that the fact may not exist, that a master should commit a barratry in a case of this kind; but I think myself justified in holding that the owner cannot be admitted to go into proof on this point, on account of the fraudulent abuse to which such a liberty must inevitably lead, since it would be perfectly easy at any time to set up the pretence, and equally impossible on the other side to detect it. For what would be the ordinary test? Letters sent to correspondents elsewhere, and insurances—measures wholly in the power of the parties, and capable of being made, at their pleasure, a complete *recipe* for a safe traffic with a blockaded place. When this consequence is duly weighed on one side, and when it is considered on the other, what few inducements a master can have to go to any other port than that, at which his charter-party binds him to deliver his cargo, and particularly to a blockaded port, it appears to me, that less injustice will be done by adopting this rule, than by permitting the freighter to distinguish, by external and collateral evidence, the destination of his cargo from that of the master.

It has been argued that the master is not the representative of the owner of the cargo. Certainly he is not, to that extent, and in the same direct manner, in which he is held to be the representative of the owner of the ship. On that account, in some cases, where facts have shewn that the intention of the owner was pure, the Court has given the party the benefit of this distinction; for instance, where the voyage began before the knowledge of the blockade, and where the master, on being warned, has appeared to have been actuated only by a personal obstinacy and perverseness, in pursuing his course to the place of his original destination. That is a case where the intention of the owner is

The ADONIS.

September 4th, 1804.

admitted to be pure, where nothing ſtands againſt it in *limine*, where there is no queſtion of fact, whether he was conſentient to the fraud; and where, if he was affected at all, it could only be by the ſtrict legal principle, that affects the principal by the conduct of his agent. Here the blockade was perfectly well known to all parties at the time of ſhipment, and therefore the queſtion is raiſed, whether the owner was not conſentient at firſt, and whether the conduct of the maſter is not demonſtrative evidence that he was ſo. In my opinion the effect of all juſt preſumption is againſt him; ſince there could ſcarcely be any inducement to lead the maſter to commit ſuch a fraud, contrary to the inſtructions and intention of the owner of the cargo. Conſidering the infinite danger of admitting the ſhippers to diſtinguiſh their purpoſe from that of the maſter, I feel myſelf obliged to hold, that it is ſufficiently proved that the ſhip was going to a blockaded port, for the purpoſe of delivering the cargo, and with the knowledge of the proprietor; and that the cargo is legally involved in the ſame penalty as the ſhip.

SHEPHERDESS, MILLER.

September 4th, 1804.

Blockade of *Havre*—Effect of a contingent deſtination as to *American* veſſels, defeated by the obſtinacy and wilful perſeverance of the maſter, after warning.

THIS was an *American* ſhip and cargo, taken on a voyage from *America* to the port of *Havre*, in violation of the blockade of *Havre*.

JUDGMENT.

Sir *William Scott*.—This caſe ſets off with ſome circumſtances in the conduct of the claimant, which are not

The SHEPHERDESS. September 4th, 1804.

not entitled to the praiſe of a fair and ingenuous proceeding. It begins with this fact, that though the ſhip was intended to go to *Havre*, all the oſtenſible papers bear a deſtination for *Embden*, to which port the veſſel was not to go in any event, unleſs all the ports of the *Channel* ſhould be in a ſtate of blockade. It is impoſſible to maintain, that it is a juſt repreſentation of ſuch a voyage, "to deſcribe it to *Embden and a market*;" when *Embden* was the very laſt port to which the veſſel was to reſort. Yet all the public papers are made out for *Embden*, and it is only in private letters that a deſtination to *Havre* is avowed; with regard to which, it is to be obſerved, that it depended very much on the diſcretion and good faith of the maſter, whether the letters would be produced or not. In ſome caſes it has appeared, that the maſters of *American* veſſels have very improperly conceived themſelves to be under no obligation to produce ſuch papers, which they conſider as *private papers*, and as not belonging to the ſhip. In all events it muſt have depended very much on the good faith of the maſter, whether he would have produced theſe concealed papers or not, and there are, I think, circumſtances that ſhew it not to have been the diſpoſition of the maſter to produce them in the preſent caſe.

It muſt be inferred, and indeed admitted, that the notification of the blockade of *Havre* had been received in *America*. To all the general rules of obſervance of a blockade duly impoſed, the ſubjects of *America* are undoubtedly bound equally with thoſe of other countries. At the ſame time looking to the great diſtance at which they are placed, and being unwilling to preſs, with any degree of hardſhip on the fair convenience of commerce, the Court has held,

The SHEPHERDESS. September, 4th, 1804.

even where the blockade of a port in *Europe* has been notified in *America*, that the merchants of that Country might ſtill clear out conditionally for the blockaded port, on the ſuppoſition that before the arrival of the veſſel, a relaxation might have taken place. But as to the line of caution to be obſerved in this ſtate of uncertainty, the Court has always expected that the inquiry ſhould be made at ſome of the *Britiſh* ports in the *Channel*. It could not be, that ſhips ſhould be permitted to reſort to the ports of the blockaded Country for this information, ſince every one muſt perceive that ſuch a liberty would place it in the power of the enemy to determine the continuance of the blockade. The ports of the *blockading Country* are certainly the proper ports for inquiry; and it would not be too much to expect, that this precaution ſhould be noted in the papers, and that it ſhould be moſt explicitly enjoined on the maſter and ſupercargo in their inſtructions, to obtain the information, that might be neceſſary to fix the deſtination, at ſome of the *Britiſh* ports in the *Channel*. I muſt obſerve alſo, that there is leſs room for excuſe in this inſtance, ſince it is ſtated to have been the univerſal impreſſion in *America*, at the time of ſailing, that *Havre* was under blockade. There could have been ſcarcely a doubt as to any relaxation of the blockade; and therefore it became incumbent on the parties to ſend out their veſſel with more particular caution.

The ſhip ſailed, and appears, evidently, to have purſued a voyage for *Havre*, not only by her courſe, but alſo by a letter put on board, at ſea, by a *French* privateer, directed for *Havre de Grace*, a few days before the capture. She was coming up the *Channel* towards *Havre*, with no other port apparently

parently in contemplation. Another fact which bears a ſtrange and unfavourable appearance againſt the maſter, is the repreſentation which he has given of what paſſed between him and one of his Majeſty's ſhips, "that on being hailed by a King's ſhip, he anſwered that he was cleared for *Embden*, but was going to *Havre*, if not under blockade, and that he was permitted to proceed." Could this have been the whole of that converſation, or can this be a fair account of it? The King's ſhip, on being informed of an intention of going to *Havre*, would have immediately endorſed the uſual prohibition on the papers It is morally impoſſible that the converſation could have ſtopped ſhort in this manner, or that the maſter ſhould not have been warned againſt proceeding to *Havre*, and with very imperative effect. The other witneſſes, who are the mate and the ſupercargo, make no mention of *Havre* in their repreſentation of this converſation. According to them, the anſwer was, "that they were bound to *Embden*." If their account is to be believed, it will very conſiderably affect the maſter as to his veracity, and will alſo fix upon him a material violation of his duty, in not ſtating the whole truth of his deſtination. But does it not go farther, and involve theſe other witneſſes alſo, as parties to the fraud, if they heard this repreſentation, and did not correct it? more eſpecially, ſince one of them is the *ſupercargo*, the agent entruſted with the *management of the cargo*, and capable of affecting his employers with a legal reſponſibility for his acts. Theſe witneſſes are, I think, to be taken as privy to the fraud on the *Britiſh* cruizer; and as concurring in ſuppreſſing the true deſtination

The Susannah
September 4th 1804.

of

The SHEPHERDESS. September 4th, 1804.

of the voyage. Then how can the Court give credit to the ſubſequent part of their repreſentation, viz. that "they were afterwards met by another *Britiſh* cruizer, the *Pluto*, and were told "that they muſt not go to *Havre*, but that they might go to *Fecamp*; that the maſter nevertheleſs kept the ſhip's courſe to *Havre*, but that he was in a continued ſtate of intoxication, and that it was the intention of the ſupercargo not to have permitted him to go into that port."

The maſter himſelf ſays, that he was intoxicated; but if ſuch an excuſe could be admitted, there would be eternal carouſings in every inſtance of violation of blockade. The maſter cannot, on any principle of law, be permitted to ſtultify himſelf in this manner by the pretended or even real uſe of ſtrong liquors, of which, if *it* were a thing to be examined, the Court could in no inſtance aſcertain the truth of the fact. The owners of the veſſel have appointed him their agent, and they muſt in law be bound by his imprudence, as well as by his fraud. As to the cargo, the ſupercargo ſays, "that he would not have ſuffered the maſter to go into *Havre*," but he had taken no ſteps to ſuperſede him. It would be a dangerous doctrine to hold, that a maſter in a ſtate of intoxication might be permitted to go on for the blockaded port, and that the ſupercargo ſhould lie by, and then come and plead the intoxication of the maſter, and exculpate himſelf, by ſtating a mere intention to diſpoſſeſs him, and to ſteer another courſe. It was the duty of the ſupercargo, and of the officers concerned in the navigation of the ſhip, to have diſpoſſeſſed the maſter of the command in ſuch critical circumſtances. Here was a veſſel duly warned not to

go

The SHEPHERDESS. *September 4th, 1804.*

go into *Havre*, yet the maſter in a continued ſtate of intoxication refuſes to alter his courſe. I cannot think that it would have amounted to any culpable act of diſobedience, or to any thing like mutiny, to have reſiſted the command of ſuch a maſter, in ſuch a condition, and to have given a proper direction to the voyage. Inſtead of that, the ſupercargo ſuffers the veſſel to proceed in this interdicted courſe, and relies only on a ſecret intention of his own mind, to diſpoſſeſs the maſter before he actually got into *Havre*, without being able to ſhew any one ſtep taken for that purpoſe. Looking at the whole caſe throughout, and recollecting always the fraudulent ſuppreſſion of the original voyage, I am of opinion that, if the inſtructions had been much more clear, on the part of the owners, than theſe are, they could not have been allowed to weigh againſt the actual conduct of the maſter. It would be the eaſieſt thing in the world to put on board inſtructions perfectly ſmooth and unobjectionable; if *they* alone could be ſufficient to exonerate the owner from the penalty attending the miſconduct of the veſſel, by imputing it to the mere barratry of the maſter, there would be an end to all means of enforcing a blockade. I am of opinion that the owners of the ſhip muſt be concluded by the conduct of the maſter; and I think that the Intereſts of the cargo are alſo implicated in this act, and that the ſhip and cargo are ſubject to condemnation.

LA FLORE

Sept. 6th 1804.

LA FLORE, Fils.

Joint Capture—Presumption in favour of a King's Ship *from being in sight alone*, sufficient to support the *animus capiendi*.

THIS was a case of joint capture, on evidence chiefly, but involving a question of law respecting the claim of a King's ship, to share in a capture, made by the Trimmer privateer, on the ground *of being in sight*, only, without an affirmative averment of the fact of joint chasing.

JUDGMENT.

Sir William Scott.—This cafe has been not improperly described to be a question of credit; a character which can by no means be said to be peculiar to the present case, since it belongs almost universally to the whole class. No class of cases is better supplied with witnesses on both sides, each set generally speaking up to the full exigencies of their case. We find them seeing not unfrequently over capes and headlands, and sometimes over whole islands, and speaking nevertheless to facts so seen by them, with as much precision, as if they were matters of the purest and most absolute demonstration. The Court has generally to perform the unpleasant task of discussing the credibility of such witnesses, and of deciding on which of the two accounts it can most safely rely. A question of law, however, has been introduced into the argument, on which it may not be improper for me, in the first place, to say a few words. It is observed that the claimants, in joint capture, have only pleaded the *being in sight*, without asserting that they were in *chase*; and it is contended, *that it is necessary to plead and prove* that *they were joint chasers*, as well as *that they were in sight*. The manner in which the

The LA FLORE.

September 6th, 1804.

the facts are alleged, would, I think, ſcarcely ſupport this objection, becauſe *it is* ſtated in the plea, that they *were in chaſe* under the diſadvantage of an almoſt entire calm, and a part of the evidence goes to ſupport that fact. But I conceive that the law is not correctly laid down in this repreſentation, as applying to the caſe of King's ſhips. *They* are under a conſtant obligation to attack the enemy wherever ſeen; a neglect of duty is not to be preſumed, and therefore, from the mere circumſtance of being in ſight, a preſumption is ſufficiently raiſed, that *they* are there *animo capiendi*. In the caſe of privateers, the ſame obligation does not exiſt. The law, therefore, does not give them the benefit of the ſame preſumption. Ships of this deſcription go out very much on ſpeculations of private advantage, which, combined with other conſiderations of public policy, are undoubtedly very allowable; but which do not lead to the ſame inference, as that which the law conſtructs on the known duty impoſed on King's ſhips. A privateer is under no obligation to attack all ſhe meets, but acts altogether on views of private advantage. She may not be diſpoſed to engage in every conteſt; and, therefore, the preſumption does not ariſe, in any inſtance, that ſhe is *preſent, animo capiendi*. *A contrary route*, if proved, would defeat the claim even of a King's ſhip. But if nothing appears, on one ſide or the other, as to that fact, the mere preſence would, I think, be ſufficient to entitle the King's ſhip to the character of a conſtructive joint captor. Having diſpoſed of the queſtion of law, I come now to compare the credit of the witneſſes. The witneſſes whom the Court is always diſpoſed to hear in the firſt inſtance, and to whom it gives the greateſt degree of credit, are thoſe of

The LA FLORE.

September 6th, 1804.

of the captured crew. So much is the Court in the habit of looking to their teſtimony, as the foundation of its deciſion, that I believe there is no inſtance, in which a claim of joint capture has been eſtabliſhed, on the evidence of the aſſerted joint-captor alone, and for the reaſon to which I have alluded, that there is ſcarcely any caſe, that might not be ſo proved; ſince it is a matter of common obſervation, in cauſes of this deſcription, that many perſons, who are in general reſpects perſons of apparently good moral conduct, will, from conſiderations of private intereſt, or from feelings of good fellowſhip, or from ſinular ideas of honour, not ſcruple to ſupport at any lengths the cauſe of thoſe with whom they have been aſſociated. The teſtimony of the *captured*, it is true, may ſometimes be liable to the imputation of being induced from vanity to repreſent the ſurrender as made *to a King's ſhip*, in preference to a privateer, in order to ſave their credit, and under an expectation perhaps that they ſhall receive rather more indulgent treatment. There may therefore be ſome little bias on this ſide alſo, againſt which the Court will be on its guard; though in the preſent caſe there is but little room for this vanity, ſince it cannot be denied that the privateer was alone ſufficient to effect the capture; there was therefore no glory loſt, no vanity to be ſaved. Making all due allowances, however, on this ſide, the Court will ſtill find reaſon to conſider them as the leaſt *objectionable* witneſſes that can in ſuch caſes be produced. It will be unneceſſary to travel through all the objections, that have been taken to the imputed contradictions in the evidence in ſupport of the claim. It will be ſufficient to ſay, that I think they are ſatisfactorily cleared away

The LA FLORE. September 6th, 1804.

by the obſervations that have been made on the other ſide. The depoſitions of the three witneſſes examined in preparatory all repreſent the *Huſſar to have been in ſight.* In ordinary caſes, the Court looks with great attention to their evidence. It is taken almoſt immediately after the capture, and before the paſſions of the witneſſes can have been embarked in the diſpute. Theſe all ſupport the claim of the King's ſhip; but in this inſtance their teſtimony has been expoſed to ſome degree of deduction, from the conduct of the King's ſhip, in diſpoſſeſſing the actual captor, and taking the priſoners into their cuſtody, a practice highly improper, and never to be mentioned in this court without an expreſſion of diſſatisfaction. To have put ſome perſon on board to take care of their intereſt, would have been perfectly correct; but to diſpoſſeſs the actual captor, who is in ſome meaſure become the agent for the claimant, is on many grounds irregular; and it does, in this inſtance, expoſe the king's ſhip to no inconſiderable diſadvantage, from the objection, that the witneſſes who ſpeak moſt effectually in their favour, have been produced out of their own hands, and ſpeak therefore perhaps under ſome degree of undue influence. Amongſt the ill conſequences of ſuch a proceeding, may be reckoned, the irritation with which this diſpute has been carried on to a plea, in which many things are introduced, to which I ſhall not think it neceſſary to advert. The main queſtion is, whether the *Huſſar* was in ſight? The three witneſſes who have been examined in preparatory, corroborated by the teſtimony of a fourth, the boatſwain of the veſſel, all depoſe, "*that ſhe was,*" and with ſomething of circumſtance detailed in their evidence, which

The La Flore. — September 6th, 1804.

which ſhews, that their attention was particularly called to the fact. Theſe witneſſes were perſons in an official capacity on board the ſhip, and I cannot but aſſent to the remark, that they are, for that reaſon, entitled to rather more credit; ſince the nature of their employment, and the reſponſibility of their ſituation, would naturally excite greater attention, it would alſo afford more opportunity and leiſure, and call upon them to be more particular in the obſervations which they made, that they might be enabled to give a ſatisfactory account of their conduct to their employers; whilſt the attention of others, in an inferior ſtation, would be more taken up in the ſervice of the veſſel, and in obſerving the ſhip which was more immediately cloſe to them. In ſupport of the claim of the king's ſhip, there are the captain, the ſecond captain, the lieutenant, and the boatſwain, of the captured veſſel, who are, I think, entitled to ſome advantage in point of credit, on the grounds which I have ſtated. There is alſo a ſpecies of evidence to which the court is in the habit of paying great attention, the documentary evidence of the log-book of the prize, which mentions "*the ſight of a ſhip early* "*in the morning, which appeared to be a frigate.*" An objection has been taken to the order in which this entry appears to have been made; but I have examined the book, and do not find that there is any thing to weaken the effect of the inference which is derived from it. There are then four witneſſes, and this record. What is the evidence on the other ſide? The teſtimony of witneſſes rather more in number certainly, from on board the prize; but they are common mariners, liable to the remarks above ſtated,

The LA FLORE. September 6th, 1804.

that their credit is on that account ſomewhat diminiſhed, beyond what could be attributed ſolely to mere inferiority of condition. They are beſides negative witneſſes, reſpecting whoſe teſtimony, in oppoſition to affirmative evidence, it is become a known rule of law not now to be diſcuſſed, that they are, *cæteris paribus*, to be heard with leſs attention. Even *they* admit, that they had ſeen the *Huſſar*, and at the time correſponding with the entry in the log-book, and although *they* did not ſee her afterwards, ſhe might poſſibly be viſible to other perſons on board. There are beſides five releaſing witneſſes from the privateer, who ſtate two facts, one, on which they agree with the laſt witneſſes, in ſaying, "*that there was no ſhip in ſight*;" and a ſecond, on which they diſagree with the whole evidence in the cauſe, viz. as to the time of capture, "*that it was made at half paſt twelve*;" whilſt all the other evidence *clearly ſhews* it to have been about three o'clock in the afternoon. This, I ſay, is *moſt clearly ſhewn* from the concurrent teſtimony of the *French* witneſſes, and the log-book of the captured ſhip; and if I cannot lay my hand on that fact as a demonſtrated fact, there is no fact in the whole caſe on which any reliance can be placed. The allegation given on the part of the privateer, nevertheleſs, ſtates the capture to have been made *at half paſt twelve*. This aſſertion is laboured, not only in the allegation, but alſo in the teſtimony of the releaſing witneſſes, and in the privateer's log-book. When I find this repreſentation contradicted by all the *French* witneſſes, even by thoſe produced on the part of the privateer, I cannot but conſider it to be a groſs miſtake; and one which throws no ſlight degree of colour over the whole caſe; ſince I cannot believe

The LA FLORE.

September 6th, 1804.

that it was ſo immaterial a fact, at leaſt in the conception of the parties themſelves, as their counſel would now repreſent it. On the interpolation which is charged to have been made in the log-book of the privateer, I ſhall forbear to obſerve farther than to ſay, that there are appearances, which might induce a ſuſpicion that ſome alteration had taken place. At any rate, when I ſee ſuch groſs inaccuracy, oppoſed to the combined teſtimony of all the witneſſes from the captured ſhip, which is not to be ſet aſide on the mere evidence of releaſing witneſſes, I think I am bound to pronounce for the claim of the *Huſſar*. The only remaining queſtion relates to coſts, which I ſhould certainly have given, if it had not been for the conduct of the king's ſhip, in diſpoſſeſſing the actual captor of the prize. This is on many grounds, as I have already had occaſion to obſerve, a reprehenſible practice, and may have led to a great deal of the irritation with which this cauſe has been conteſted. It may, indeed, have been the ſole cauſe of this litigation, becauſe, if the *French* witneſſes had told their ſtory when produced by the actual captors themſelves, there could ſcarcely have been a foundation for the reſiſtance, that has been given to the claim of the *Huſſar*. I am of opinion, that the king's ſhip has in this conduct receded from the right of coſts, which otherwiſe would certainly have been given.

On reconſideration, the Court directed the expences on both ſides to be deducted out of the proceeds.

THE

THE CHARLOTTE, FOCKS.

September 7th, 1804.

Swediſh treaty—copper in ſheets, if contraband.

THIS was a queſtion reſpecting a quantity of copper in ſheets, taken on a voyage from *Stockholm* to *Amſterdam*, and claimed as the property of merchants in *Sweden*.

On the part of the Captor, the King's Advocate contended—That this copper was to be deemed contraband, more particularly under the terms of the *Swediſh* treaty (*a*), by which *the ſupply of all manufactured articles, immediately ſerving for the equipment of ſhips of war*, was prohibited. By the certificate of inſpection which was now returned, it would appear "*that* "*one part of the copper in queſtion* was fit for the ſheathing of ſhipping—although the ſame return ſtated, that another portion was doubtful, as to its fitneſs for that uſe, and *that the remaining part was not fit for that purpoſe.*" The quality of theſe latter parcels, however, will not be material, ſince if any part is of the deſcription of contraband, it will affect the whole ſhipment, being the property of the ſame perſon.

25th *July* 1803; Art. 1.

On the part of the Claimant, Laurence and Swabey contended—That this was a queſtion of conſiderable importance to the trade of *Sweden*, although the preſent quantity in diſpute was very ſmall, not more than three tons. That it could not be ſuppoſed that the ſtipulation in the *Swediſh* treaty was meant on either ſide to prohibit the exportation of articles of *Swediſh* produce, farther than the intereſts of the belligerent Country were likely to be affected by them; that it could not therefore be intended to comprehend any other copper than ſuch as was fit for the purpoſes of

The CHARLOTTE.

September 7th, 1804.

war. That the certificate of the officers of the Dock-yards did not ſtate any part of this copper to be peculiarly adapted to naval purpoſes, but "that the whole was fit for all the ordinary purpoſes to which copper is uſually applied." That as to that portion which was reported by them to be fit for ſheathing of ſhips, their opinion was not concluſive; it would be proper to ſet in oppoſition to it a certificate which was now introduced from the managers of the *Swediſh* Copper Company, ſtating, that this copper was peculiarly aſſorted for the uſe of copperſmiths; that copper for ſheathing of ſhips was never ordered from them but of two *(ſpecified)* dimenſions; and that this copper was not fit for that purpoſe.

In Reply, the King's Advocate contended—That the only queſtion would be, whether this was *ſheet copper* (*a*), or copper in a manufactured ſtate, ſerving for the equipment of ſhips of war. It by no means appeared that the ſheathing of veſſels was the only naval purpoſe for which the exportation of copper was intended to be prohibited, ſince it was an article uſed in various other branches of naval equipments. But if any part was liable to be conſidered as contraband it would affect the whole quantity. The opinion of the *Swediſh* Copper Company was not *produceable*, as being not on oath; it was beſides very apparent how little credit was due to it, ſince it averred that no part of the copper was fit for the ſheathing of veſſels, although the contrary was now certified by the official perſons of his Majeſty's dock yard, to whom that queſtion had been referred.

(*a*) In the treaty with *America*, 1795, Art. 18. *copper in ſheets* is ſpecifically enumerated amongſt articles of contraband, "*ſerving directly to the equipment of veſſels.*"

JUDGMENT,

JUDGMENT,

The CHARLOTTE.

Septemb r 7th, 1804.

Sir *William Scott.*—If it is contended on the part of the Crown, that copper in *ſheets*, though not adapted to the ſheathing of ſhips, is contraband under the treaty, it is a queſtion that may be of conſiderable importance, and one that I ſhall certainly direct to ſtand over for further conſideration. The decree which I am diſpoſed to make at preſent is, to condemn that part which is reported fit for the ſheathing of veſſels; farther than that I ſhall not go. In ordinary caſes, the rule is, that one article of contraband quality will affect all the parts of the cargo on board belonging to the ſame proprietor; but this is a new caſe, reſpecting the conſtruction of a treaty, on which a difference of opinion may have been entertained. I ſhall therefore not apply the old rule to this caſe, but direct the undiſputed articles to be reſtored. The other parcels of copper which are reported to be of a doubtful quality, muſt be reſerved for farther conſideration.

THE PRESIDENT, WELLES.

September 8th, 1804

National character—Claim for an aſſerted *American*, ſettled at the *Cape of Good Hope*, rejected—Plea of removal not ſufficiently ſubſtantiated.

THIS was a caſe of a ſhip taken on a voyage from the *Cape of Good Hope* to *Europe*; and claimed for Mr. *J. Elmſlie*, as a ſubject of *America*. It appeared that he had been a *Britiſh* born ſubject, who had gone to the *Cape of Good Hope* during the laſt war, and had been employed as *American* Conſul at that place.

In ſupport of the claim, Laurence and Robinſon contended—That the claimant was entitled to the moſt favourable conſtruction of his caſe that was conſiſtent with the rules of law. That he was a *Britiſh* born ſubject, who had ſettled at the *Cape*; and though he

The PRESIDENT.

September 8th, 1804.

had borne the character of an *American* Conſul, whilſt that ſettlement was under *Britiſh* poſſeſſion, it appeared that the *Dutch Government* had ſince refuſed to admit him in that character, from which it might be inferred that he was conſidered at the *Cape* rather in his hoſtile *Britiſh* character, than as an incorporated *Dutchman*. That his veſſel had been, during the year preceding the preſent voyage, hired by the *Eaſt India* Company to carry troops to *India*; that ſhe had been in that employment recognized as an *American* veſſel, and was now coming in that character, in the ſervice of *Britiſh* merchants, under a licence from the *Britiſh* Government. That the claimant was, beſides, entitled to be conſidered as a perſon ſettled there, *during Britiſh poſſeſſion*; and as affording evidence of an intention to remove, ſince there was a letter on board, written to his correſpondent at *Embden*, in which he directs him "to ſell the ſhip, and remit the proceeds to *him* in *America*, where he hoped to be in a few months." It was prayed on this point that proof might be permitted to be given of his removal.

On the other ſide, the King's Advocate contended—That he could be no otherwiſe conſidered by the Court, than as a reſident merchant of a *Dutch* ſettlement. This ſhip ſailed ſo late as *March* 1804, nearly twelve months after the breaking out of the war, and left the owner ſtill reſident there in his *Dutch* character. That there was no caſe in which an intention to remove, after a reſidence ſo long continued, for nearly a whole year after the breaking out of the war, had been allowed to be averred, and no *overt* act of removal was aſſerted to have taken place.

JUDGMENT.

JUDGMENT.

The PRESIDENT, September 8th, 1804.

Sir William Scott.—The Court muſt, I think, ſurrender every principle on which it has acted, in conſidering the queſtion of national character, if it was to reſtore this veſſel. The claimant is deſcribed to have been for many years ſettled at the *Cape*, with an eſtabliſhed houſe of trade, and as a merchant of that place, and muſt be taken as a ſubject of the enemy's country. The ſhip was purchaſed by him of an *American* owner; and ſtill continued to be documented as an *American* veſſel. It has appeared, I think, in other caſes, to be the diſpoſition of the *American* Government to confer the privileges of *American* navigation on veſſels occupied by their Conſuls in foreign ſtates. That Government has, undoubtedly, a perfect right to grant ſuch a privilege for the purpoſes of their own navigation; at the ſame time, that this country is alſo at liberty to apply, what we conſider as the more correct principle of the law of nations, ſo far as third parties are concerned. Some ſtreſs has been laid on the ſervices in which this veſſel had been employed, and in which ſhe *was* engaged at the time of capture, under a licence, which is ſaid to amount to a recognition of her *American* character. Any deſcription that is given of her in that licence, muſt depend entirely on the repreſentation of the parties, and if *that* is not true, it will not avail to affect the principle of law, that would be otherwiſe applicable to the veſſel in her proper character. Such a recognition, as it is called, has never been allowed to weigh in any caſe of veſſels coming under a licence, whenever a queſtion has been raiſed as to the real character of the owner, or as to the fact of property.

The PRESIDENT.

September 8th, 1804.

perty. This circumſtance, therefore, is immaterial. It is next ſaid, that the claimant is entitled to the benefit of an intention of removing to *Philadelphia* in a few months. A mere intention to remove has never been held ſufficient, without ſome overt act; being merely an intention, reſiding ſecretly and undiſtinguiſhably in the breaſt of the party, and liable to be revoked every hour. The expreſſions of the letter, in which this intention is ſaid to be found, are, I obſerve, very weak and general, of an intention merely *in futuro*. Were they even much ſtronger than they are, they would not be ſufficient: Something more than mere verbal declaration, ſome ſolid fact, ſhewing that the party is in the act of withdrawing, has always been held neceſſary in ſuch caſes. Nothing of that ſort is averred. The Court is therefore under the neceſſity of conſidering this gentleman as a merchant of the enemy's country, and of pronouncing the ſhip, as his property, liable to condemnation.

Sept. 10th, 1804.

THE CHARLOTTE, WITT.

Prize intereſt, in virtue of a ſeizure made by a private ſhip of war, aſſerted to be attached as tender to a King's ſhip—The fact of her being *ſo attached* not made out. Condemnation, as droits, the maſter of the privateer not being on board.

THIS was a caſe of intereſt, aſſerted on the part of his Majeſty's ſhip the *Euridice*, in a capture made by the hired armed revenue cutter the *Duke of York*, on a ſuggeſtion that the cutter was placed under the command of the *Euridice*, and was to be conſidered as a tender attached to that veſſel.

The CHARLOTTE. Sept. 10th, 1804.

On the part of the Admiralty.—It was ſubmitted, that the Cutter was put under the command of the *Euridice*, as a ſuperior veſſel on the ſame ſtation, but that ſhe was not attached as a *tender*. That the capture was made whilſt the maſter was not on board, and therefore, that the Prize muſt be condemned as a droit of Admiralty.

JUDGMENT.

Sir William Scott.—The queſtion which ariſes on the capture of this veſſel is, viz. Whether the actual captor can be conſidered as *commiſſioned*, and as *commiſſioned in ſuch a manner* as to entitle the King's ſhip to take an intereſt in the prize. The capturing veſſel was a revenue cutter, and, according to the practice of the preſent and laſt war, commiſſioned with a letter of marque. The policy of employing ſuch veſſels in this manner is, I believe, a modern uſage, ariſing out of the exigency of the public ſervice, which has particularly required the uſe of ſmall veſſels of this kind. They have been allowed to take out private commiſſions, and if thoſe commiſſions are properly executed, they will enure to the benefit of the parties till they are ſuperſeded; and I am not diſpoſed to think, that the employment of the veſſel in the manner alleged would have the effect of ſuperſeding that commiſſion. It happened that the maſter was not on board at the time of capture; and on that account no claim is made for the veſſel herſelf, but for the *Euridice*, as the veſſel to which ſhe is repreſented *to have been attached as a tender*. It is ſaid that ſhe was commanded by a lieutenant of the *Euridice*; but by what reaſoning that can be made out I am at a loſs to conceive, ſince it appears that

The CHARLOTTE. *Sept.* 10th, 1804.

that every order was addreſſed to the maſter, and there is no circumſtance appearing that leads to a ſuppoſition, that there was any ſuch perſon as the lieutenant of the *Euridice* on board. The claim for the King's ſhip is given, in virtue of a ſeizure ſaid to be made by this veſſel, *as a tender*; and in order to ſupport that averment it muſt be ſhewn, either that there has been ſome expreſs deſignation of her in that character by the orders of the Admiralty, or that there has been a conſtant employment and occupation, in a manner peculiar to tenders, equivalent to an expreſs deſignation, and ſufficient to impreſs that character upon her. The former ſpecies of proof would undoubtedly be moſt deſirable, but no ſuch deſcription by the Admiralty is averred. She is not deſcribed any where as a tender, *in terminis*. Then what is there in the mode of employment? I ſee nothing in the orders to diſtinguiſh her from any other ſmall veſſel that might be aſſociated with a King's ſhip to act under ſuperior command, but not as a tender. I am of opinion, therefore, that there is no ſufficient foundation to induce the Court to conſider her in the capacity of a tender (*a*). She is not ſo recognized in

(*a*) Since the deciſion of the Court of Admiralty, in the caſe of the *Melomane*, *Colas*, ſupra, page 41, againſt the competency of King's ſhips, on *home ſtations* to *conſtitute or adopt tenders* manned from their crew, to be a part of their force, authoriſed under the original commiſſion of the ſhip, to take prizes for the benefit of the King's ſhip.—A ſimilar queſtion has been diſcuſſed before the Lords of Appeal, *as to the effect of ſuch a practice in the Weſt Indies*, on the claim of the *Abergaveany* to ſhare in the capture of *Curacoa*, in virtue of the preſence and co-operation of a tender *ſo conſtituted*, and ſent out to cruize by the captain of that ſhip, without the intervention of any public authority. When the Court of Appeal decided againſt the claim.—The iſland of *Curacoa* and its dependencies, Lords, May 4, 1805.

terms

terms by any authority proceeding from the Admiralty; neither is the nature of the ſervice impoſed upon her ſuch, as to induce a ſuppoſition that ſhe muſt have been ſo conſidered by the Admiralty. As the maſter was not on board, the legal intereſt in the capture will not enure to the private captors under their commiſſion; but it muſt be condemned as a droit of Admiralty, taken by non-commiſſioned captors.

October 10th, 1804.

THE LIESBET VAN DEN TOLL, HEEST.

National character from occupation in the fiſhing trade of *Holland*—Reſtitution.

THIS was a queſtion reſpecting the national character of a fiſhing-adventure, carried on by a native *Dutchman*, who had become by *domicil* a ſubject of *Pruſſia*, and had purchaſed the veſſel, formerly a *Dutch* veſſel, in *February*, at *Embden*. It appeared that he had ſince been employed in fiſhing off the *Dutch* coaſt, having ſold his cargoes to *Engliſh* ſhips, and having once or twice reſorted to *Dutch ports*, not for the purpoſe of ſelling his cargoes, but merely to procure bait.

JUDGMENT.

Sir William Scott.—It appears to me that this caſe is very favourably diſtinguiſhed from that (*a*) of yeſterday, where there was reaſon to believe, from the evidence of the mate, that the maſter had delivered his cargoes in *Dutch* ports; although that circumſtance was altogether ſuppreſſed by the maſter in his depoſition. That fact, connected with the original character of the veſſel, and of the maſter, ſeemed to the Court to amount to a caſe of *Dutch occupation*, and the veſſel

(*a*) *Jonge Jeroem, Krom*, condemned 9th *October* 1804.

The LIESBIT.

October 10th, 1804.

was on that ground condemned. Here the occupation is certainly much ſlighter. It is not denied, that a native *Pruſſian* might have engaged in ſuch an adventure, without drawing on himſelf the conſequences of a *Dutch* character. He might unqueſtionably have reſorted to the *Dutch* coaſt for the purpoſe of fiſhing; as it is indeed not unuſual for fiſhermen to frequent very diſtant ſhores. Then the only queſtion will be, whether this man, being a native *Dutchman*, and a *Pruſſian* ſubject by domicil only, but of ſeven years continuance, and not having recently taken it up for any purpoſes connected with the preſent war, would be differently affected by this employment. I am diſpoſed to hold that he would not. It was open to him to go to the coaſts of *Holland* to carry on his fiſhery in his *Pruſſian* character; he was alſo at liberty to ſell his cargoes at ſea, as he appears to have done, in every inſtance, to *Britiſh* veſſels, who have lately been very numerous on the coaſts of *Holland*, and might be expected to furniſh a good market for commodities of that kind. The only circumſtance that can raiſe a doubt is, that he appears to have reſorted to the *Texel* for *bait*. It is ſaid that this, though in itſelf a ſlight circumſtance, affords no immaterial indication of the *Dutch* character, and of the *Dutch* origin of this employment. But I am not prepared to ſay that this circumſtance alone, unconnected with any habits of delivering his cargoes in the *Dutch* ports, will be ſufficient to affect him with a *Dutch* character. To hold otherwiſe would, I think, be to preſs the doctrine of occupation rather too rigidly, againſt a claſs of caſes which has uſually been very favourably conſidered, and treated with peculiar lenity and forbearance.

Reſtitution.

THE COMET, ADAMS.

October 10th, 1804.

Condemnation in the Court of the enemy on a ſhip lying in a neutral port—*Henric and Maria, ſupra*—Prohibition on the part of the neutral country as to this practice—How far affecting the principle—Fact of ſuch prohibition not proved.

(*a*) Supra, vol. iv. p. 43.

THIS was a caſe of a *Britiſh* veſſel, that had been captured by the *French*, and ſold in a *Spaniſh* port, after a condemnation had paſſed in the Courts of *France*.

On the part of the Captors, the King's Advocate contended—That the preſent caſe was diſtinguiſhable from the *Henric and Maria* (*a*), by this circumſtance, that the Government of *Spain* had actually prohibited the ſale of veſſels ſo ſituated in *Spaniſh* ports. That all the reaſoning which was drawn from the acquieſcence and ſanction of the neutral ſtate, in former caſes, would therefore fail, and that this muſt be conſidered as an illegal transfer.

On the part of the Claimant it was ſaid, That the prohibition alluded to had not iſſued till after the ſale of this veſſel.

JUDGMENT.

Sir William Scott.—There is, I think, abundant evidence to ſhow that the argument raiſed on a ſuppoſed contravention of the *Spaniſh* law is not founded on fact. The ſale paſſed by public auction, which would ſcarcely have been going on after ſuch a practice had been prohibited by proclamation. There is, beſides, the certificate of the *Britiſh* Conſul, ſtating the prohibition to have been ſubſequent to this ſale. It will therefore not fall within the range of the principle on which the diſtinction has been raiſed. Stripped of this

The COMET.

October 10th, 1804.

this circumſtance, the caſe comes exactly under the authority of the *Henric and Maria*, in which this Court pretty ſtrongly intimated its opinion, as to the correct principle of law, at the ſame time that it found itſelf bound by the current of former practice to reſtore. That caſe has, I underſtand, been argued before the Lords of Appeal, and is now waiting for the Judgment of that Court. Till the opinion of the ſuperior Court is expreſſed, I ſhall adhere to the ſame courſe of deciſion, and reſtore the veſſel. Expences prayed, not given.

THE APOLLO, KARSDADT.

October 11th, 1804.

Blockade of *Dieppe*—Excuſe over-ruled—Complaint againſt the mode of taking the maſter's depoſitions—contradicted, not ſuſtained.

THIS was a caſe of a ſhip proceeded againſt for a breach of the blockade of *Dieppe*, after having had due warning noted on her papers. In the depoſitions, the maſter and all the other witneſſes appeared to have ſaid, "*that the maſter on being warned, declared that he* was bound to *Dieppe*, and could *not go* any where elſe, and that if he could obtain a fair wind, he ſhould run into *Dieppe*;" and his conduct was repreſented as conformable to this declaration, in hovering on the coaſt of *Dieppe*. An affidavit was now offered on the part of the maſter, complaining that his anſwer to the interrogatories had been incorrectly taken; and that he had never made ſuch a declaration, or entertained an intention of going into *Dieppe*, after the warning.

On

On the part of the Captor, the King's Advocate objected to this affidavit being received, obſerving, that no notice had been taken of any ſuch miſunderſtanding till the 6th of *October*, a few days before the hearing; and that it was not entitled to credit.

JUDGMENT.

Sir William Scott.—The firſt queſtion which I have to determine is, how far the depoſitions can be taken to contain a true repreſentation of the facts. If they cannot, the Court undoubtedly will be under the neceſſity of reſorting to ſome other ſource of information. An affidavit has been offered on the part of the maſter, complaining that he has been very greatly miſrepreſented in theſe depoſitions; but I am of opinion that this complaint comes in a manner which does not entitle it to be received by the Court. It is a very lenient mode of adminiſtering juſtice, that prevails in theſe Courts, to take the evidence, in the firſt inſtance, only from the *captured*, who are produced, in the preſence of the agents of the parties, before the commiſſioners and actuary, whoſe duty it is to ſuperintend the regularity of the proceeding, and to protect the witneſſes from ſurprize, or miſrepreſentation. When the depoſition is taken, each ſheet is afterwards read over to the witneſs, and ſeparately ſigned by him, and then becomes evidence common to both parties; it being very rarely permitted to the captor to produce any evidence. The principle, therefore, on which the evidence is conducted, is as favourable to the claimant as it can poſſibly be. If any of theſe precautions are omitted, it would be competent to the party to complain immediately, and if ſuch a complaint was regularly made, it would become

The APOLLO.

October 11th, 1804.

come a duty moſt preſſing on the conſcience of the Court, to inſtitute the moſt accurate enquiry into the grounds of ſuch complaint. In this caſe nothing of the kind has been done; but when the cauſe is opened, and the depoſitions are read, then ſomething is produced in the form of an affidavit, which is to have the effect of overruling all the evidence that has been taken in the ſolemn manner already deſcribed. I think I am bound to reject this affidavit *in toto*, and I cannot but conſider it as an unjuſt imputation (*a*) on thoſe who have the functions of the Court, for the purpoſe of taking the evidence, delegated to them. Then I am to conſider the caſe on the repreſentation which the maſter and the other witneſſes have given. It appears that the veſſel ſailed ignorant of the blockade which had been impoſed on the port of *Dieppe*(*b*)

(*b*) By Notification 5th *Aug.* 1804.

(*a*) On a ſubſequent day, in anſwer to the intimation which had been directed by the Court to be conveyed to the Commiſſioners and Actuary, before whom the depoſitions were taken, of the charge made againſt their proceedings in the maſter's affidavit, *it was mentioned by the King's Advocate* that the interpreter, Mr. Moſes Hart, had made an affidavit, ſtating "that he had been twenty years employed as German interpreter, under the commiſſioners of the Court at Portſmouth, and that he had poſſeſſed a competent knowledge of the German language, from being born a Jew in Amſterdam, where the German language is uſually ſpoken amongſt Jews, and from a ſubſequent reſidence of many years as a printer in Berlin. That the depoſitions were taken with great caution, and carefully read over, and interpreted to the witneſs. That the account of the declaration therein contained was accurately taken down from the words of the maſter." The King's Advocate ſtated alſo that there were affidavits from the captain and officers of the blockading frigate, repreſenting the conduct of the ſhip to have been conformable to the declaration of the maſter, as repreſented in his depoſitions.

but

The APOLLO. October 11th, 1804.

but ſhe was duly warned, and the maſter does not ſay that he did not underſtand the warning. I accede to what has been obſerved on the part of the claimant, that ſuch a warning might be allowed to be received, at firſt, with ſome heſitation, and that it would not be the diſpoſition of the Court to take advantage of any haſty expreſſions uſed in the moment of ſurpriſe. If a fooliſh declaration *was* made, apparently idle and without a perſevering obſtinate intention of carrying it into execution, it would, I think, be a harſh exerciſe of the rights of war to preſs ſuch a haſty declaration to the diſavantage of the maſter, and more eſpecially to the forfeiture of the property of others entruſted in ſome meaſure to his diſcretion. But if ſuch a declaration is made, and accompanied by ſuch circumſtances as impreſs on the mind of the Court a conviction, that the maſter was perſiſting in a ſerious determination of acting agreeably to it, the captor is not bound to wait till he proceeds to carry his deſign into execution; it is ſufficient that he had made a deliberate declaration, accompanied with ſuch facts as induce the Court to believe, that he really intended to carry it into effect. It is ſaid that a maſter, in ſuch a ſituation, would be under much diſtreſs and difficulty to determine *where he ſhould go*. It may be ſo; but he could be under no doubt, as to his negative duty, as it may be called, *that he was not to go* into the blockaded port. It muſt be clear and obvious to him, that the neighbourhood of the blockaded port cannot be conſidered as the fit *locus deliberandi* for his future plans. If the Court was to admit that a maſter might lie to, and call a council of his own thoughts, or of thoſe of his crew, in ſuch a place, the rights of blockade could no longer exiſt to any pur-

The APOLLO.

October 11th, 1804.

pose; he would stay, in all cases, until an opportunity offered of slipping into the interdicted port. It would be practically inconsistent with the exercise of this right of war to hold, that the blockading force is bound to stay by him, and wait for the result of his deliberation in this suspected place. On the contrary, his first duty is obvious, *fuge litus;* that neighbourhood is at all events to be avoided. He is bound on the first notice to take himself out of an equivocal situation, and if he obstinately refuses and neglects so to do, this Court will hold, till it is corrected by the judgment of the superior Court, that such a conduct will amount to a breach of the blockade, and subject the vessel to condemnation. Then what is the fact? The master declared, according to the depositions of himself, and of the other witnesses, not only "that he *must* go," which it is said would be the same expression in *German*, as "that he *ought to go*," but also that "*he will go*" to Dieppe, and after due warning he is still found near the same place, with the ship's head towards *Dieppe*. Taking this representation to be true, as I am bound to do, it appears incredible to me, I confess, that he should, as he now asserts, have acted in this manner, without any intention of going into *Dieppe*. If, however, it is possible, that this assertion can be true, I have only to lament, as I have abundant occasion to do, the folly and obstinacy of masters, who will place themselves in situations, which it is impossible for the Court to admit to be innocent, without breaking down all the rules, on which alone the principle of blockade can be sustained. On these grounds I feel myself obliged to pronounce this vessel guilty of a breach of the blockade, and consequently subject to condemnation.

KARASAN,

KARASAN, YEUSEF.

Nov. 9th & 13th, 1804.

A part owner of a Privateer not exempt from his general reſponſibility by compenſation *pro tanto*, and a releaſe of the claimant as to him.

THIS was a caſe on a monition, calling on the maſter and owners of a *Gibraltar* privateer, to bring in the account of ſales and the proceeds of a ſhip and cargo, captured in *October* 1797, and carried into the iſland of *Sardinia* (*a*). On the part of one of the owners of the privateer, a *releaſe* was brought in, and it was prayed that the monition might be ſuperſeded as againſt him, and that he might be diſmiſſed, on a ſuggeſtion "that he had ſettled with the claimants, according to the proportion of intereſt which he held in the privateer; that he had actually paid 5250 dollars, and had obtained a releaſe and acquittance of all farther demands from the maſter, acting for himſelf, and under a full power of attorney, given for that purpoſe by the owners of the cargo."

In oppoſition to this prayer, The King's Advocate and Arnold contended—That the party alledged to having

(*a*) This caſe aroſe on the capture of a *Tuniſſian* Veſſel, taken in *October* 1797, and carried into *Sardinia*. A ſuit was firſt inſtituted in the Admiralty Court of *Gibraltar*, calling on the captor, to proceed to adjudication, but the caſe was pronounced not to be within the juriſdiction of that Court. Proceedings were then commenced in the High Court of Admiralty, and a moniton iſſued the 4th of *May* 1804, citing the maſter of the privateer to proceed to adjudication, and calling on the ſeveral owners and one ſurety to ſee proceedings. On the ſame day a farther monition was alſo decreed againſt the owners of the privateer, and againſt one ſurety, "to bring in the proceeds of the ſhip and cargo."

The KARASAN. Nov. 7th & 13th, 1804.

given the releaſe was not competent to releaſe a part-owner of a privateer, from the general liability which by law attached upon him, and which might, in many inſtances, extend far beyond the amount of his particular intereſt in the ſhip.

On the other ſide, Laurence contended—That the releaſe was as full and comprehenſive in its terms as it could be made; it was given in the names of all intereſted in the claim, and under a ſpecial authority for that purpoſe, delegated to the maſter, and with a direct view to the preſent proceeding before the Court of Admiralty.—When the intention of the claimants to apply to the High Court of Admiralty was firſt intimated, the party had expreſſed a wiſh to make immediate compenſation. He was entitled therefore, to as much protection as the Court could afford him, from the readineſs which he had ſhewn to ſatisfy the demands of juſtice, by a voluntary and early reparation.

JUDGMENT.

Sir William Scott.—The queſtion for the conſideration of the Court is, whether this perſon can be diſmiſſed from being a party in the ſuit; not whether he ſhall be decreed to pay the money, ſince the merits of the caſe are not at preſent before me. It is not denied that the *ſuit* muſt proceed againſt others, and that *ſome perſons* may be held liable to coſts and damages, for the acts which have been committed by the Maſter of the Privateer; but it is contended that this part-owner is entitled to be exonerated and releaſed from all further appearance, in virtue of a formal releaſe

leaſe executed to him by the claimant. I will not now enter into any diſcuſſion of the validity of the releaſe, in reſpect to form; perhaps the objection on that point may not turn out to be material. Suppoſing the caſe to ſtand free of all objections of that kind, I am of opinion that the releaſe cannot avail, to exempt this perſon from being held a party to the ſuit, to which all the owners of a Privateer are, in the firſt inſtance, liable, and not merely for their own ſhares reſpectively, but for the total amount of what may be awarded againſt the mall. (*a*)—The foreigner, who executed this releaſe on payment of a ſhare, was probably ignorant of this extenſive protection which the law had given him. He likewiſe has a right to call upon them *all*, not only for reparation, but alſo for all the information in their poſſeſſion. It is ſaid that the information which can be derived from the anſwers of this perſon, as a party to the ſuit, may be obtained from him as a witneſs—Undoubtedly it might, if the Court could diſmiſs him from all farther obſervance of juſtice, and render him a perſon wholly unintereſted, but that is more than I think myſelf authorized to do.

The Court rejected the prayer for the diſmiſſal of this party, and decreed attachments on the other parties who had not made any return to the monition.

(*a*) So in Lord *Stair*'s deciſions of the Lords of Seſſion of *Scotland*, 9th *Feb.* 1675, in the caſe of *Praris* v. *Martin*, v. 2. p. 319. The prayer of certain *part owners* to be diſmiſſed on payment of their reſpective ſhares, was over-ruled; and it was held that all the owners of a privateer are reſponſible conjunctly and ſeverally *in ſolidum*. In that collection of Reports may be ſeen many caſes on prize queſtions, which appear to have been agitated on very juſt principles, and may be conſulted with advantage, more eſpecially with reſpect to the practice of thoſe times.

Nov. 13th, 1804.

NOSTRA DE CONCEICAS, CUNHA.

Amelioration, as to ships purchased under an illegal title, without condemnation, allowed under the circumstances of the case—Notice that such allowance will not be continued.

THIS was a case of a *British* vessel captured by a *Dutch* privateer, and carried to the coast of *Africa*, and there sold to the present claimant, a subject of *Portugal*, without having been brought to legal adjudication. The ship was decreed to be restored to the former owner. An application being made on behalf of the neutral purchaser, that he might be allowed the amount of sums laid out upon the vessel.—

The Court observed—In a case like the present, where the invalidity of the title might not be known to the *Portuguese* purchaser, I should be unwilling that he should lose the benefit of any money which may have been actually expended in the improvement of the ship. I am the more inclined to make an allowance for amelioration in the present case, because it is perhaps not quite clear that the *Dutch* captor did not take his prize to some place on the coast of *Africa*, where something in the form of a condemnation might pass, though not in any Court regularly constituted for that purpose. If there shall appear to have been any actual amelioration, therefore, I shall direct the *Portuguese* purchaser to be reimbursed. At the same time neutral merchants must observe, that this is an allowance which the Court will not think itself bound to continue, after the invalidity of these titles has been so generally made known by the decrees of this Court, and of the Superior Court (*a*). If persons will accept ships

(*a*) *Professurranee Peltet. Lords, 10th August 1803.*

ſhips in this manner, after ſuch a notice, it muſt be at their own peril that they proceed to lay out money upon a title ſo notoriouſly invalid.

The NOSTRA DE CONCEICAS.

Nov. 13th 1804.

THE BETSEY, WINPENNY.

Nov 22d, 1804.

Bail for cargo taken by claimant, not *reduced* to the amount of the *actual* proceeds.

THIS was a caſe of an application made to the Court on the part of a claimant who had taken the goods on bail at an admitted value, to have the bail reduced to the actual value of the goods, on a ſuggeſtion that the ſale had *not* produced ſo much, as the ſum at which they had been appraiſed.

Court.—There ſeems to be no pretence for this application. The party took the cargo not merely as a *middle man*, as he has been deſcribed in argument, who was to be employed to ſell to the beſt advantage for the uſe of the *jus habentium*.—It was to the claimant himſelf that the goods were delivered at his own deſire, and at an agreed value, by which the amount of the intereſt in diſpute was completely concluded. If the value had proved much greater than the appraiſed ſum, the captor would have derived no benefit from the increaſe. The ſpeculation in that event would have been advantageous to the claimant only; he would have brought in no more than the appraiſed value. The adventure being *unfavourable*, the ſame valuation

The BETSEY. Nov. 22d, 1804.

must be adhered to, as equally binding *against* him. I have no hesitation in rejecting this prayer, and with costs (*a*).

(*a*) So, as to *salvage cases*, in the *Jonge Bastian, Slegtin*, 17th *Feb.* 1806, in which a proportional salvage had been decreed. The owners had taken the cargo on bail, at an appraised value. An application was afterwards made to the Court to reduce the rate of salvage, on a suggestion that it exceed d the net proceeds, owing to the expences attending the sale.

The Court rejected the Petition.

So, in the *Graff Bernstorff April* 3, 1805.—In respect to the expences attending the sale of a cargo taken on bail by the claimant, and afterwards condemned, it was objected on the part of the claimant that the Registrar and Merchants had refused to allow certain charges made for warehouse room, and expences attending the conversion of the property. But the Court overruled the objection, observing, I can have no hesitation as to any expences incurred after the property was taken on bail; The captor cannot be liable to any such charges. It was a free speculation on the part of the claimant to take the property at an appraised value, with all the charges attending it. As it appears that a sum of 1800*l.* has been retained in the hands of the claimant under the pretext of this objection, I shall over-rule the objection, and decree interest to be paid for the money so detained.

THE

THE JONGE KLASSINA, Bol.

Nov. 30th, 1804.

National character of Mr. *Ravie*—Licence to a *British* merchant to *import*, not extended to protect shipments made by him in person in an enemy's country, as a merchant of that country.

This was a case on the national character of the claimant, under the particular circumstances of this transaction, and on the effect of a licence granted to Mr. *Ravie*, of *Birmingham*, "for the *importation of certain goods from Holland* into this country." The question was, whether it could operate to protect a shipment made *by him*, in person, *in Holland*, and under papers describing the firm of his house, as "*Ravie* and Co. of *Amsterdam*."

On the part of the Captors, the King's Advocate and Robinson.—The effect of the licence can extend no farther than to protect a shipment, made for the account of Mr. *Ravie* in his character of an *English* merchant. It was a *licence* to import in the character of a *British* merchant, and could not enure to protect a transaction conducted by the person himself in *Holland*, *as a merchant of Holland*, and in the character rather of an *exporter* from the country of the enemy, than merely as *importer* into this country. Mr. *R.* is shewn in the evidence to have been present in *Holland*; and though it is said that he was there only on his way from the *German* fairs, it no where appears what was the particular nature or duration of his residence in *Holland*. He had a *known firm* at *Amsterdam*, to which letters were addressed, and his business is stated by himself "to be carried on by his AGENT in *Amsterdam*, except when he is *there* himself." It may be true that he has an extensive establishment at *Birmingham*; but if he has at the same time a *commercial* establishment

The JONGE CLAASINA.

Nov. 30th, 1804.

eſtabliſhment in another country, his tranſactions muſt be referred reſpectively, as to their national character, to the country in which they originate. In this tranſaction he appears to have been conducting his concerns under the protection of the *Dutch* Government, and as a perſon incorporated in the commerce of *Holland*. Under theſe circumſtances he muſt be taken as a *Dutch* exporter of theſe goods, rather than as the *Britiſh importer*, and the licence granted to him in the latter character, will not extend to protect his *intereſt* in a ſhipment made by him in his former capacity. The deſcription of the property, in the bills of lading is, beſides, at variance with the terms of the licence, which empower him "to import, &c. certain articles, *being his property*;" whereas the goods are ſtated in the bills of lading to *be coming for the* account and riſk of Mr. *Berry* of *Topſham*.

On the part of Mr. Ravie, Laurence referred to the affidavits that had been brought in on the part of the claimant, and contended—That Mr *Ravie* was not to be conſidered as a merchant of *Holland*; that the ſhipment had been made by him on his return from the *German* fairs; that he had not any eſtabliſhed domicil in *Holland*; that there was no ground to impute to him any other national character than that of a *Britiſh* merchant, in which character he had been before known in this Court, in tranſactions originating in his houſe of trade at *Birmingham*. On the ſecond point, reſpecting the diſagreement of the property with the terms of the licence, it was argued, that the goods were actually coming on the *account and riſk* of Mr. *Ravie*, ſince it was a part of his agreement with the perſon at

Topſham, that Mr. *Ravie* ſhould guarantee the goods until their arrival in a *Britiſh* port.

The Jonge Clasina.

Nov. 30th, 1804.

JUDGMENT.

Sir William Scott.—This queſtion ariſes on the claim of Mr. *Ravie*, deſcribing himſelf *as* "*Ravie of Birmingham*," for certain goods coming to be imported into this kingdom from *Holland* under the authority of a licence. In all caſes of this kind, the terms of the licence muſt be conſidered, as the only authority under which the goods can be imported by a *Britiſh* ſubject from the enemy's country; and I may here obſerve, that it would not be the diſpoſition of this Court to narrow the operation of ſuch a licence, more eſpecially under the ſevere preſſure which the commercial concerns of *Britiſh* merchants have ſuſtained from the war. Mr. *Ravie* appears to be a perſon engaged very extenſively in the manufactures of this country, in the employment of our artizans, and in the export and import trade of the country; and it will be to be lamented, if exertions ſo laudable and ſo proſperous ſhould meet with any check from the effects of war. But if ſuch a misfortune ſhould have befallen him, I need not ſay, that it is out of the power of this Court to afford relief againſt the neceſſary concluſions of law. The province of this Court can extend no farther, than to pronounce, whether the tranſaction comes fairly and adequately within the terms of the licence, under which alone it can be ſupported.

The licence was granted to Mr. *Ravie* to *import* certain goods, "*being his property.*" On the queſtion relating to *the property*, conſidering the terms on which the goods are now ſtated to have been ſhipped

The JONGE KLASINA.

Nov. 30th, 1804.

ped "*for Mr. Berry,* but *at the riſk* of Mr. *Ravie* during the voyage," I am diſpoſed to hold that this proviſion of the licence, which refers to the deſcription of property, has been ſufficiently complied with. But it appears, that Mr. *Ravie* was not only the *importer*, but the *exporter* alſo; that he was perſonally preſent in *Holland* ſuperintending the ſhipment according to the evidence, as it is now explained, in the ſame manner as any other merchant of that country would have done. So the maſter deſcribes him in the additional affidavit which has been permitted to be introduced. What is it that the broker does, on being employed by the maſter to procure a freight? He goes to Mr. *Ravie*, as a man would go to a known merchant of this place. Mr. *Ravie* appears to have been the ſhipper. *He* contracts with the broker, and is deſcribed in the charter party as "*Ravie* and Co. merchants *at Amſterdam.*" Am I then at liberty to ſay that this is a tranſaction which comes fairly within the terms of the licence, or that it is lawful for any individual to engraft the character of *Dutch exporter* on a licence granted to him as a *Britiſh* merchant to *import?* If it could be ſhewn that there was any neceſſity, or any conſideration of policy, that required ſuch an indulgence, the proper mode would be, that it ſhould be preſented to the view of the Government, at the time when the licence is obtained; and then permiſſion to that extent might be inſerted in the terms of the licence itſelf. Without ſuch a declaration of the intention of Government, for this Court to apply the licence to the protection of ſuch a tranſaction as this is, *would be*, I think, to carry it far beyond the fair conſtruction, which the terms of the grant

The JONGE KLAASINA. Nov. 30th, 1804.

grant will bear. I am far from imputing to Mr. *Ravie* any improper motive in this affair. A breach of native allegiance it could not be, as Mr. *Ravie* does not appear to be a native ſubject of this country. I will go farther and ſay, that there does not appear to have been an intention on his part, of violating any duties which he owed to this Country. The motive was, I dare ſay, merely *commercial*, and, perhaps, within his apprehenſion of what was permitted to him under the terms of his grant. But, I fear, that this is *his* expoſition only, and not one which the law will allow me to entertain. If trade with the enemy is generally unlawful, it is not in the power of this Court to admit it, beyond the degree which is fairly deſcribed in the terms of the licence. The hardſhip of the caſe has been ſtrongly preſſed, on a repreſentation that Mr. *Ravie* went to *Holland* only for the purpoſe of collecting debts, and on his return from the fair at *Frankfort*. The Court has looked anxiouſly into the evidence, to ſee on what ground ſuch an aſſertion was founded; becauſe if it had appeared that this was a ſolitary inſtance of engaging in *Dutch* commerce, the Court would be induced to ſtrain hard to eſcape from the neceſſity of pronouncing the property ſubject to confiſcation. Something of that kind, does appear, indeed, in the affidavits; but of the perſons who make thoſe affidavits, I muſt ſay, that they ſeem to know more of *Ravie*'s affairs than Mr. *Ravie* himſelf. I have looked into his affidavit, and can diſcover nothing reſpecting the particular purpoſe of collecting debts. All that *he* ſays is, "that after the *Frankfort* fair he went to *Holland* "*to ſettle ſome*

The JONGE CLASSINA.

Nov. 30th, 1804.

ſome mercantile concerns." Thoſe concerns might be all future arrangements. Without aſſenting to the principle, that a *Britiſh* merchant could, with ſtrict propriety, go in any caſe into the enemy's country without the authority of the State, the Court might be diſpoſed to exert the utmoſt indulgence that could be conſiſtent with the rule of law, for the relief of a perſon, who had found himſelf in the enemy's country, *in tranſitu*, merely, and for occaſional purpoſes only, not originally connected with this tranſaction. But when I look at Mr. *Ravie*'s affidavit, I can find no grounds for conſidering his caſe as that of a man merely ſtepping over the line of demarcation, and making ſhipments only for the purpoſe of collecting his debts.

This brings me to the conſideration of Mr. *Ravie*'s national character. It is not ſaid what is his native character, but it is much inſiſted on that he is ſettled in this country, and engaged in extenſive manufactures here. Mr. *Ravie* muſt know, and thoſe who have ſtated his caſe know perfectly well, that his meritorious eſtabliſhment in this country, to the extent which I have ſtated, cannot be permitted to affect this queſtion. A man may have mercantile concerns in two countries, and if he acts as a merchant of both, he muſt be liable to be conſidered as a ſubject of both, with regard to the tranſactions originating reſpectively in thoſe countries. That he has no fixed compting-houſe in the enemy's country, will not be deciſive: How much of the great mercantile concerns of this kingdom is carried on in coffee-houſes? A very conſiderable portion of the great inſurance buſineſs

The JONGE KLASINA.

Nov. 30th, 1804.

ſineſs is ſo conducted. It is indeed a vain idea, that a compting-houſe or fixed eſtabliſhment is neceſſary to make a man a merchant of any place: If he is there himſelf, and acts as a merchant of that place, it is ſufficient; and the mere want of a fixed compting-houſe there, will make no breach in the mercantile character which may well exiſt without it. Mr. *Ravie*'s own repreſentation is, "that he went to *Holland* for the purpoſe *of arranging his mercantile concerns*, and that he has for a long time carried on trade and buſineſs at *Birmingham*." As to his buſineſs at *Birmingham*, I may diſmiſs the whole of that circumſtance, as what cannot admit of a doubt. The queſtion will ſtill remain, whether he is not alſo a merchant of *Holland*, in this particular tranſaction? He ſays, "that he employs Mr. *V.* as his agent at *Amſterdam*, to receive letters, and that letters are addreſſed to him there to *Ravie* and company at *Amſterdam*." This circumſtance has been contended to be parallel with the caſe of Mr. *Portalis*, who had agents at *Bourdeaux*, and at various other places, whilſt he himſelf was reſident at *Neufchatel*. But there is this diſtinction which has been overlooked, that Mr. *Portalis* did not appear to have been perſonally preſent at *Bourdeaux*; he might have agents in different parts of the world, but he himſelf was reſident at *Neufchatel*. If he had been himſelf at *Bourdeaux*, that fact might have made a very material difference in his caſe. What is the ſituation of Mr. *Ravie* in this reſpect? He ſays, "that he has employed agents at *Amſterdam except at thoſe times when he finds it convenient to go there*," which may be three or five times in a year: At ſuch times I am to ſuppoſe that

he

The Jonge Klassina.

Mar. 30th, 1804.

he did not employ agents, but tranſacted his own buſineſs. What is meant by a *nominal firm* at that place, which I perceive in ſeveral paſſages of theſe affidavits, I am at a loſs to underſtand, ſince Mr. *Ravie* appears to have been as ſubſtantially employed in the trade of *Amſterdam*, as any other mercantile firm of that place. The character in which he ſtands before the Court, in this particular tranſaction, correſponds exactly with this view of his general connexion with that place. The charter-party is brought not to Mr. *V.* his agent, but to *himſelf*, and he ſigns it as a merchant of *Amſterdam*. It would, I conceive, be too much for me to pronounce, that this can legally be done; or, in effect, that a man may go to the Enemy's Country, as often as he pleaſes, under the authority of a licence of this kind, and there act as a *Dutch* merchant, carrying on the export trade of that country. I feel, I hope, as much as other perſons, for the difficulties under which the commerce of this country, and commercial men, may be placed by the events of war; but it is not in my power to bend the principles of law for their relief. If it is fit that ſuch relief ſhould be afforded, it muſt be given elſewhere and by higher powers. This Court has no authority to exerciſe ſuch a diſcretion, but is under the painful neceſſity of pronouncing this property ſubject to condemnation.

THE

THE CHARLOTTE, KOLTZENBERG.

Nov. 16th, 1804.

Contraband.—Maſts, *Ruſſian* property and produce, not being on board a *Ruſſian* ſhip, not within the protection of the *Ruſſian* treaty.

THIS was a caſe of a cargo of maſts and ſpars, taken in a *Lubeck* ſhip, on a voyage from *Riga* to *Nantes*, being the produce of *Ruſſia*, and claimed as the property of a merchant of that country.

On the part of the Captors, the King's Advocate and Laurence.—Maſts, more particularly thoſe of the large dimenſions of the preſent cargo, are univerſally conſidered as articles *per ſe* contraband, without reference to the particular character of the port to which they are going. They are articles for military uſe, in a manufactured ſtate, and ſtand in this reſpect, on a different footing from pitch, tar, and hemp, in regard to which, a general relaxation has been admitted in favour of merchants exporting ſuch articles, as the produce and raw commodities of their own country. *Maſts* have never been conſidered as within the range of this relaxation, unleſs excepted by particular ſtipulations of treaty. Between this country and *Ruſſia*, a late treaty has diſtinctly provided a rule of law for queſtions of contraband; but that treaty will not extend to protect cargoes like the preſent, conſiſting of articles in their nature contraband, and *not on board a veſſel of the exporting country*. It has been admitted in argument, in other caſes, that the ſtipulation of former treaties with *Ruſſia*, with reſpect to the carrying of contraband articles, regarded only the *navigation* of *Ruſſia*, and was reſtricted to the caſe of *Ruſſian* produce and property on board *Ruſſian* ſhips. In a caſe (*a*), in which that topic

(*a*) *Apollo*, *Boteler*, ſupra, vol. iv. p. 158.

CHARLOTTE. Nov. 16th, 1804.

topic had been adverted to, the Court expreſſed an opinion that the late treaty could not be held to have introduced any alteration on that point, but that it was to be conſidered as providing for the freedom of commerce, *only*, as connected with *the navigation* of *Ruſſia*, that is, on board *Ruſſian* ſhips. Indeed the whole tenor of thoſe articles of the treaty which relate to this queſtion will be found to refer to the ſituation of property on board *Ruſſian* ſhips. The proviſions on this ſubject are to be found in the third and fourth articles, which clearly point to the *immunities of Ruſſian ſhips*. The third article ſtipulates for the freedom of *commerce and navigation*; "*that the ſhips* of the neutral power may navigate freely to the enemy, &c." that the effects embarked on board *the neutral ſhips* ſhall be free, with the exception of *contraband* of war, and of enemies' property. Then follows an enumeration of *contraband*, excepting, however, "ſuch *quantities* of the ſaid articles, as may be *neceſſary* for the *defence of the ſhip*," pointing, even in this particular enumeration, to the caſe of a *Ruſſian* ſhip. In the concluſion of that article, the contracting parties enter into the moſt formal engagement "to renew the ſevereſt prohibitions to *their captains*, whether of ſhips of war or merchantmen, to take, keep, or conceal, on board *their ſhips* any of the articles which, in the terms of the preſent convention, may be reputed contraband." The tenor of ſuch an engagement relates entirely to the immunities and obligations of *Ruſſian ſhips*; and it cannot be contended that any relaxation in favour of articles *per ſe* contraband has been introduced by this treaty, except in connection with the navigation of *Ruſſia*, *or*

on

The CHARLOTTE. Nov. 16th, 1804.

on board *Ruſſian* ſhips. It will be ſufficient however, to advert to the deciſion of a late caſe before the Lords (*a*), in which articles of a ſimilar kind, *maſts*, on board a *Swediſh* ſhip, from a port of *Ruſſia* to *Cadiz*, and claimed as the property of Mr. *Schriboom*, a *Ruſſian* merchant, and conſul for the *Swediſh* nation, were condemned and with coſts, in affirmance of the ſentence of the Court below. The preſent queſtion, therefore, is a queſtion concluded in this Court, not only by the general principle of law, but by the expreſs deciſion of the ſuperior Court in a caſe exactly ſimilar.

(*a*) *The Graeffen Van Gothland*, *Aug.* 19, 1803.

On the part of the claimants, Arnold and Robinſon. —It may be material, in the firſt inſtance, to correct a poſition which has been aſſumed in argument, on the other ſide, from an erroneous aſſertion of counſel, made in the *Apollo*, *Botcher*, (*a*) viz. That the former treaties with *Ruſſia*, on this ſubject, referred only to the *navigation* of *Ruſſia*; that is to *Ruſſian* ſhips. If former treaties are conſulted, it will be found, that in all of them the ſame or ſimilar terms are uſed: the treaty of 1797, article 10, expreſſes "*commercer*," with exception of contraband; the treaty of 1785, 1766, "to come and *trade* freely with thoſe *States*," with the exception of contraband; the treaty of the 2d *December* 1734, article 11. "*Aller Venir and Commercer*;" in the late treaty, freedom of *commerce and navigation*. The terms, therefore, of all the treaties between the two countries, are perfectly correſponding, and of the ſame *import*; and whatever the true conſtruction may be, it is not to be aſſumed

(*a*) Adm. Rep. vol. 4. p. 158.

The CHARLOTTE. Nov. 16th, 1804.

that there has been any *variation*, or that the *commerce* and *navigation* are to be inſeparably connected in the interpretation of the preſent treaty, merely becauſe the privilege was confined to the navigation only, and to *Ruſſian ſhips* by former treaties. The fact is otherwiſe, the words of former treaties contain no ſuch limitation. It will be material to enquire then, what has been the interpretation of thoſe treaties, and the practice under it. It may be fit, however, previouſly to obſerve, that if a *limitation* had *anciently* exiſted, it would not be concluſive in the preſent caſe, inaſmuch as the claimant would be entitled to the general principle, applicable to all caſes of contraband, viz. that articles being the produce of the exporting country, and as ſuch entitled to relaxation, are not deprived of the benefit of that relaxation, by being on board the ſhips of another country. This principle was much diſcuſſed, and deliberately announced as the rule of law, in the caſe of the *Apollo*, *Botcher*, in which a quantity of *Hemp*, in the ſituation of the preſent cargo, being *Ruſſian* produce and property, on board a *Lubec ſhip*, was declared to be nevertheleſs within the protection of the relaxation, and reſtored to the *Ruſſian* claimant. If it could be ſhewn, therefore, that all former treaties provided only for caſes of articles on board *Ruſſian* ſhips, it would not operate on the preſent queſtion, ſince the privilege being greater under the general principle of law, it can not be ſuppoſed, that *Ruſſia* intended to admit of cloſer *reſtrictions* than were applied to other nations. But there is no neceſſity to reſort to the benefit of this reſervation. The meaning of the older treaties, is beſt illuſtrated

illuſtrated by the ancient practice which prevailed, upon ſolemn diſcuſſion, in this Court and in the Court of Appeal, ſoon after the firſt treaty, which contains any reference to this ſubject, that of *December* 2d, 1734. In the war of 1744, this queſtion came ſolemnly before the Court. The general inſtructions delivered to cruizers in that war (18 *June* 1744,) had declared maſts to be contraband (*a*). In 1747, in the caſe of the *Providentia*, *Boyſen*, maſts, going from *Riga* to *Breſt*, *Port Louis*, *Rochfort*, *Nantes*, or *Bourdeaux*, on board a *Lubec* ſhip, but claimed by a *Ruſſian* ſubject, were reſtored, and in a note now extant, of the judgment of the Court, the queſtion was ſtated to be, whether naval ſtores, being the produce of the exporting country, were contraband. It was obſerved, that, by the exiſting treaty with *Ruſſia*, ſuch articles were not enumerated in the liſt of *contraband articles*, becauſe they were the growth and produce of that country; that although they had been declared *contraband generally*, by the inſtructions of 1744, yet, as thoſe inſtructions did not refer in any manner to the law between the two countries, as it ſtood previouſly on the treaty, they could not be taken to have abrogated that treaty; conſequently, that ſuch articles

(*a*) 5 Art. "That all ſorts of fire-works, and things thereto belonging, as cannons, muſkets, mortars, petards, bombs, grenadoes ſaucifſes, pecrauſen, carriages, reſts, bandaliers, powder, match ſaltpetre, bullets, pikes, ſwords, head-pieces, cuiraſſes, halberds horſes, ſaddles, holſters, belts, ſail-work, rigging, cables, cordage maſts, head, pitch, tar, hemp, together with all other equipage that ſerves for ſea or land, laden in *Daniſh* or *Swediſh* ſhips, or ſhips belonging to neutral countries, and bound to the enemies' country, are accounted contraband goods."

The CHARLOTTE

Nov. 16th, 1804.

were not to be deemed contraband." It may be ſaid however of that caſe, that the *ſhip* (though the point of property ſeems to have been doubtful) was not clearly a ſhip of another country, and might be taken as a *Ruſſian* ſhip, and in that view the caſe would not be applicable to the preſent queſtion. The caſe is cited chiefly to ſhew the manner in which the reaſoning upon this queſtion, with regard to *Ruſſia*, operated generally. From another caſe, of an earlier date, it will appear, that the diſtinction as to the ſhip was of no effect. The caſe of the *Vierge Mary*, (Admiralty, 14 *Dec.* 1744,) was preciſely in point, being a caſe of ſtaves and timber of other deſcription, and forty large maſts, on board a *Dantzick* ſhip, and going to *France*. The ſhip and cargo were reſtored in the Court of Admiralty. The caſe was appealed; and the *præſertim* of the Appeal on the part of the captor ſtated, "that it was a cargo conſiſting of naval ſtores, *maſts*, and other materials proper for ſhipping." But it ſeems that the law on the treaty was ſo clear, that this argument was not urged at the hearing. Farther proof was ordered of the property, and it was finally reſtored; and in a note extant of that caſe, it is ſaid, that the point of contraband goods and the privilege of the treaty were not entered upon. It ſeems then to have been taken as too *clear* in the treaty to admit of argument. In a ſubſequent caſe—the *Fortuna de la Mer*. Sir *G. Lee* ſpoke of it in theſe terms: "The *Vierge Mary* turned upon the article of the treaty with *Ruſſia*;" and again, Sir *Edmund Simpſon*, "for the *Vierge Mary*, a *Dantzick* ſhip, with a *Ruſſian* cargo, were reſtored on the treaty." The reaſoning of thoſe times in which the queſtion firſt aroſe upon the then recent ſtipulation,

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is to be taken under the general rule of conſtruction, as the beſt interpretation of the meaning of the *treaty*. By a view of theſe precedents, it will appear that the conſtruction which is now attempted to be put upon the preſent treaty derives no ſupport from the practice of thoſe times. On the contrary, the authority of thoſe times is in direct oppoſition to the reſtriction now contended for, and affords a ſtrong ground of preſumption, that *Ruſſia* did not in this treaty mean to convey away any rights which had been before allowed to her trade, farther than the terms of the treaty neceſſarily import. The treaty itſelf cannot be ſaid to make any ſuch renunciation. The articles on this head are few in number, and are ſhortly drawn up. They ſeem in their obvious meaning to point equally to the *intereſts* of *commerce* and *navigation*, *referendo ſingula ſingulis*. To conſider the terms as applicable only to the joint ſtate of *Ruſſian* commerce on board *Ruſſian* ſhips would be a harſh conſtruction, in point of language, and ſtill more ſo, with regard to the equity of the benefit which is the object of the contract. To limit the privilege to caſes of *Ruſſian* cargoes on board *Ruſſian* ſhips *alone*, would be to reduce the number of ſuch *cargoes* without any aſſignable reaſon in law or policy. But it is ſaid that this is a decided queſtion; and the caſe of the *Graeffen Van Gottland* before the Lords is cited as a concluſive authority. The particular grounds of that deciſion were not ſtated by the Court of Appeal. It would therefore be impertinent to conjecture how far they might bear a neceſſary application to the circumſtances of the preſent caſe. From ſome not immaterial facts of that caſe, however, it may be allowed to ſhew that there

The CHARLOTTE.

Nov. 16th, 1804.

might be grounds of condemnation, which do not occur in the preſent caſe. That was a caſe of a ſhipment of maſts during the late war in 1797, a war, in the commencement of which *Ruſſia* had taken a more than ordinary intereſt, and *had* pledged herſelf, and indeed exacted an engagement from other powers (*a*), that all *ſupplies* ſhould be prevented from being carried to the *enemy*. A ſhipment of ſuch articles to the port of an enemy would be, therefore, in violation of a particular engagement applying only to that war. There was beſides this additional circumſtance of aggravation attending that ſhipment—that it was conſigned to the public arſenal of the enemy—a mode of conſignment which always furniſhes ſome inference againſt the claim of neutral property, and on the queſtion of law is conſidered in a more unfavourable view than mere mercantile conſignments. Upon the whole it is ſubmitted, that the authority of that caſe is not neceſſarily concluſive againſt the preſent claim; that the words of the treaty import no reſtriction; and that the relaxation applied to articles of native growth

(*a*) 25th *May*, 1793. Article 3d. "Their ſaid Majeſties reciprocally engage to ſhut all their ports againſt *French* Ships, not to permit the exportation, in any caſe, from their ſaid ports for *France*, of any military or naval ſtores, or corn, grain, ſalt, meal, or other proviſions; and to take all other meaſures in their power for injuring the commerce of *France*, and for bringing her by ſuch means by juſt conditions of peace."

Article 4th. "Their Majeſties engage to unite all their efforts to prevent other powers, not implicated in this war, from giving, on this occaſion of common concern to every civilized State, any protection whatever, directly or indirectly, in conſequence of their neutrality to the commerce or property of the *French*, on the ſea, or in the ports of *France*."

and

and produce, does in principle and practice extend to the preſent caſe.

JUDGMENT.

Sir William Scott.—This caſe has been argued much at length on the operation of the treaty, and on the authority of former practice; and it certainly preſents a queſtion of conſiderable importance. But it will not be neceſſary or proper for me to travel much into the argument, becauſe, if there is a deciſion of the Superior Court, ſo recent as 1803, on a a ſimilar point, it will be concluſive upon my judgment, and I ſhall have only to follow the rule of law there laid down, and to act under the authority of that deciſion. Let us ſee then whether the caſes are ſo far parallel caſes, as to be ſubject to an application of the ſame principle. The *Graeffen Van Gottland* was a ſhipment of maſts to *Cadiz* in a *Swediſh* ſhip, and, as the maſter appears to have ſaid in his depoſitions, "to be delivered to private conſignment." This is a ſhipment of ſimilar articles, going in a *Lubec* ſhip to *Nantes*. The two caſes have this circumſtance in common, then, that the claimants are merchants of *Ruſſia*, exporting articles of the ſame kind to the enemy, not in the vehicles of their own country. Unleſs there are other circumſtances to diſtinguiſh the caſes, the deciſion of the Lords upon the former caſe muſt be the *guide*, which this Court would be bound to follow. Then what are the diſtinctions pointed out? It is ſaid that the claimant in that inſtance was the *Swediſh* Conſul in *Ruſſia*; but that circumſtance could have made no difference, ſince it muſt have been *familiar* to all who had to *judge* of that caſe, that his character

The CHARLOTTE. Nov. 16th, 1804.

character of Conſul to a foreign nation could not vary the principle that was to be applied to it. As a perſon reſident in *Ruſſia*, he could be conſidered in no other light than other merchants of the country. It is then ſaid, that the cargo was going to the public arſenal of the *enemy*.—It was going to *Cadiz*, which is a place of great military equipment, but it is a place of great mercantile equipment alſo; and it does not appear, I think exactly as it has been repreſented, that thoſe articles were to be delivered to the public arſenal of the State. What has been ſaid on the other ſide is, I think, true, that the nature of the port is not material; ſince maſts, if they are to be conſidered as contraband, which they will be unleſs protected by treaty, are ſo, without reference to the nature of the port, and equally, whether bound to a mercantile port only, or to a port of naval military equipment. The conſequences of the ſupply may be nearly the ſame in either caſe. If ſent to a mercantile port, they may be there applied to immediate uſe in the equipment of privateers, or they may be conveyed from *Nantes* to *Breſt*, and there become ſubſervient to every purpoſe, to which they could have been applied if going directly to a port of military equipment. The only other diſtinction is, that the deciſion alluded to, paſſed on a capture of the late war in 1797, when this Country and *Ruſſia* were bound by a particular convention to a ſtricter co-operation in the war *againſt France*; But the deſtination of the *Graeffen Van Gottland* was not to *France*, but to *Spain*, which country was by no manner affected by the Convention of 1793. It has appeared, I think, in numerous inſtances, that the commercial intercourſe between *Ruſſia* and *Spain* was not

The CHARLOTTE. Nov. 16th, 1804.

not interrupted, but that there was a conſiderable trade going on between the two countries during the whole war. Theſe diſtinctions then are inſufficient to vary the principle of law, which I feel myſelf bound to apply under the authority of the Superior Court. Without going into the antecedent hiſtory of the law on this queſtion, I muſt conſider the authority of this recent caſe decided by the Superior Court as binding on me. That judgment muſt be ſuppoſed to have been formed with reference to former authorities; and it is not even now contended, on the part of the claimant, that the late treaty of 1801 puts the commerce of *Ruſſia*, with reſpect to theſe articles, on a more favourable footing than it was before. The effect of that deciſion is concluſive on me, and I have no heſitation in pronouncing this cargo ſubject to condemnation.

THE WIGHT, FORD.

Nov. 30th, 1804.

Salvage on re-capture, by a convoying ſhip, granted.

THIS was a caſe of ſalvage ariſing on the re-capture of a veſſel by a convoying ſhip, within a ſhort time after the capture, and before ſhe had been carried out of ſight. The facts of the caſe were, that the *Wight* was ſailing under the convoy of the *Thiſbe*, on a voyage from *Zante* to *London*; that in paſſing the narrow channel between *Cephalonia* and *Ithaca*, the whole convoy was becalmed, and, whilſt in this ſituation, a privateer rowed out from the land by means of ſweeps and made a capture of the *Wight*. On ſignal being made, the *Thiſbe* immediately put out her boats, which purſued

The WIGHT.

Nov. 30th, 1804.

purſued the privateer, and within an hour or two re-took the *Wight*, and alſo made a capture of the *privateer*, with the loſs of one man.

On the part of the captor, the King's Advocate and Arnold.—There is no reaſon to diſtinguiſh this caſe from other caſes of re-capture, on which ſalvage is directed to be given by the Prize Act. That the re-captor was the veſſel, under whoſe protection the prize had been originally ſailing, will not vary the caſe, ſo as to defeat the principle of law which operates in ordinary caſes. It is true that ſome latitude of diſcretion ſeems to have been exerciſed on this point, in certain caſes that have been formerly determined in this Court. In the *William* in 1803 no ſalvage was decreed; but in other caſes, in the *Creighton*, 29 *January* 1780, and in the *St. George*, 15th *July* 1785, ſalvage was given. And it is material to obſerve, that the principle on which the Court proceeded in theſe caſes, where ſalvage *was given*, appears to have received confirmation from the Court of Appeal, in the caſe of the *Hinchinbrook*, 28th *January* 1786, in which ſalvage was at firſt refuſed in the Court of Admiralty; but that ſentence was reverſed, and ſalvage was afterwards decreed by the Lords of Appeal.

On the part of the Owners, Laurence and Robinſon. It is not to be denied that caſes may occur, in which convoying ſhips will not be precluded from claiming ſalvage, on the re-capture of ſhips originally under their protection; but on the other hand it would be obviouſly unequitable, and attended with very injurious

The WIGHT.

Nov. 30th, 1804.

rious conſequences, to hold out ſuch a reward to *every act* of recapture, or rather of *aſſiſtance* afforded againſt the common enemy in one identical conteſt. The true line of diſtinction ſeems to be, whether the original relation between the convoying ſhip, and the veſſel in queſtion, had been interrupted and broken by ſeparation or not? The caſe which has been principally relied on before the Lords, the *Hinchinbrook*, perfectly accords with this diſtinction, and affords no precedent for a claim of ſalvage under the circumſtances of the preſent caſe. That veſſel had come to anchor on the outſide of the convoying veſſel, with an intention of going farther in, but drifted to ſea, and was captured the next day by a force ſuperior to that of the convoying ſhip, and after *that ſhip* had maintained a combat, and had done all that was in her power for the protection of the veſſel. Whether the capture was within ſight of the convoying ſhip, or not, was not diſtinctly aſcertained, but the re-capture did not take place till the next day, and was in no manner conected with the original meaſures of defence. The relation of convoy had been entirely broken, and there could be no reaſon why the convoying ſhip, falling in with the veſſel again after ſhe had been completely in the hands of the enemy, ſhould not be entitled to ſalvage, as well as any other veſſel that had originally borne no relation to her. But what are the circumſtances of this caſe? Here is a merchant ſhip *becalmed* within ſight of the veſſel under whoſe protection ſhe is placed—The boat of a privateer takes advantage of the *calm*, and makes a *temporary ſeizure*. The aſſiſtance which the convoying veſſel would have been bound to give, in the way of preventing the capture, if ſhe herſelf could have

The WIGHT.

No. 30th, 1804.

have moved, could be given only by the means of her *boats*. If they did not arrive till the crew of the privateer had gained a temporary poſſeſſion, that accidental circumſtance cannot be deemed ſufficient to alter the nature of the aſſiſtance given, nor make that a re-capture, which, in fact, could only be conſidered as a continuation of the *combat*, on the part of ſhips aſſociated together for mutual ſervice.—This rule of interpretation ſeems to reſult from the nature of aſſociation in common danger, and it becomes ſtill more reaſonable and imperative, ſince a late Act, 43d *Geo.* 3d. c. 57, § 10, has not left to merchant veſſels any option on this matter, but lays an obligation upon them to put themſelves under the protection of convoy, and impoſes upon them a tax for the aſſiſtance which they are ſuppoſed to receive. Under ſuch circumſtances they acquire a more complete right to all the protection which can poſſibly be given, without encroaching on the general duties upon which the convoying ſhip is employed. The words of that Act point to ſuch a caſe as the preſent, as being within the protection of the convoying ſhip, on the *original terms*, and without raiſing a caſe for remuneration, ſince it is there directed, "that ſhips under convoy, if they are in danger of being taken poſſeſſion of by an enemy, ſhall make ſignals to the ſhips of war *under whoſe protection they are ſailing*, &c."

JUDGMENT.

Sir William Scott.—This caſe comes before me upon an alledged act of recapture performed by the *Thiſbe*, who had a number of merchant veſſels under her convoy. One was captured by the enemy, and was afterwards

The WIGHT.

Nov 30th, 1804.

retaken by the *Thiſbe*; and for that ſervice the *Thiſbe* now ſtands before the Court, demanding the ſalvage which is allowed to King's ſhips on ordinary occaſions by the Prize Act. The firſt queſtion that ariſes is, Whether a convoying ſhip may be entitled to ſalvage from ſhips under her protection? That queſtion has, I think, been decided by the authority of the caſe of the *Hinchinbrook*, which is binding on me; becauſe it was there laid down, that the relation which had ſubſiſted between the convoying ſhip, and thoſe under her care, would not take the caſe out of the general proviſions of the Prize Act. I conſider that to have been the ancient doctrine of this Court; and it was, I think, recognized as ſuch by the deciſions of my Predeceſſor, becauſe he ſeemed to hold that the demand might generally be conſidered as fairly within the operation of the Act; although he determined that, under the particular circumſtances of the caſe then before him, no ſalvage was due. He entered, I recollect, pretty fully into the circumſtances of that caſe, and concluded, that there had been ſome neglect on the part of the convoying ſhip, which would defeat the right of the ſalvors. The Court of Appeal was of opinion that no ſuch imputation was raiſed againſt the convoying ſhip by the facts of the caſe; and farther, that ſuch a queſtion, if it aroſe in fact, was a matter to be diſcuſſed in another form, and was not fit to be introduced in a civil cauſe of this nature, to repel a demand to which the re-captor would be entitled, on the general principle of law. It would indeed, as it was then obſerved, be attended with very great injuſtice to the character of naval officers, if the propriety of their conduct on ſuch occaſions could be brought into diſcuſſion incidentally in this manner; and I advert to this

The WIGHT.

Nov. 30th, 1804.

this conſideration more particularly, becauſe I perceive that an inſinuation of improper conduct has alſo been introduced into the preſent *caſe*.—But under the authority of the *Hinchinbrook*, I think myſelf warranted to conſider it as a charge to which this Court will not attend, till otherwiſe eſtabliſhed. If a complaint was gravely preferred and ſubſtantiated elſewhere, on a proper repreſentation to the Lords of the Admiralty, it might be competent to this Court to ſay, that no claim to reward ſhould be grounded on an act, thus pronounced to be an act of miſconduct by a tribunal properly qualified to decide upon it. But to admit ſuch accuſations in this form, would be attended with great injuſtice to the naval officer whoſe character was implicated in the charge, and would be productive of great inconvenience to the Court. If I was to admit the inſinuation in any degree, I muſt alſo receive exculpatory evidence on the other ſide, and that would be to let myſelf out to the practice of trying a criminal caſe throughout, which was ſo juſtly reprobated by the Superior Court on the former occaſion. The only material queſtion for me to conſider then, is, Whether there was ſuch a capture made by the enemy as would found a caſe of *re-capture*. Many caſes might be put of the effect of immediate acts of re-capture, to ſhew, that it is by no means neceſſary that the poſſeſſion by the enemy ſhould be *long* maintained, or at any particular diſtance from the convoying ſhip. The queſtion will always be, Whether it was an effectual poſſeſſion, and ſuch as would ſuſpend the relation of the convoying ſhip; *not*, Whether it is a *complete* and firm poſſeſſion, which, for ſome purpoſes, is, in contemplation of law, not held to be effected, till the prize is carried *infra præſidia?* The rule of *infra præſidia*, however, is certainly not the meaſure

The WIGHT.

Nov. 30th, 1804.

measure to be applied to questions of this kind: The very clause of the Prize Act alludes to cases of salvage, in which no such complete possession is supposed, since it speaks of vessels being re-captured, and permitted to continue on their original voyage. As little can it be contended that the vessel should have been out of sight, to found a case of re-capture; it will be sufficient, if there has been that complete and absolute possession, which supersedes the authority of the convoying ship; and such a possession must have been maintained for some time in the present instance. Every act of possession was exercised; the master was taken out; the vessel was completely manned with as many of the captor's crew, as were sufficient to overpower all resistance, and the vessel was taken in tow by the enemy. By these acts the former relation subsisting between this vessel and the convoying ship was necessarily suspended. A ship in possession of the enemy can obey no signal, nor support its former duties and subordination to the convoying ship. There might still remain an obligation on the part of the convoying ship to attempt the re-capture, as far as it could be done consistently with the safety of the other vessels under her protection. Such a duty would result from the injunctions of the Prize Act, which provides a reward for the re-captor, when the service is effected, and cannot therefore be intended to preclude the demand of salvage, though the service rendered to the individual by the re-captor, may be no more than a sense of public duty would otherwise require from him. The capture is, I think, proved to have been sufficiently completed; and unless I could go to the length of holding that there must be a firm possession, and a bringing *infra*

præſidia, I muſt pronounce this veſſel to have been recovered from a ſituation, which has been decided to be ſufficient to ſupport the claim of ſalvage by the deciſion of the Superior Court.

December 12th, 1804.

THE JONGE BASTIAAN, STEYTING.

(Inſtance Court.)

Salvage in Diſtreſs—Amount at which the action was at firſt entered, not binding on the Court as to the quantum, &c.

THIS was a caſe of ſalvage on derelict, for the recovery of a ſhip which had ſtruck upon a rock, near *Harwich*, had loſt her rudder and beat in her bottom, and, being deſerted by her crew, was warped off by the *William and Mary ſmack*, with great danger and peril. After ſhe had been ſo brought off, and placed in ſuch a ſituation that the maſter was able to take away ſome bullion, which compoſed part of the cargo, the veſſel ſunk, from the damage which ſhe had received, but was afterwards weighed up, and brought to *Harwich* by ſix other *ſmacks*, with great and continued exertions through five weeks. The value of the property ſaved was ſtated to be about 3,400l.

On the part of the Salvors—it was repreſented to have been a ſervice of very great merit, and it was prayed that the Court would think the ſalvors entitled to a very liberal remuneration.

On this point, Arnold, for the Owners, objected—That the action had been entered only for the amount of 800l. and that the Court could not grant a ſalvage exceeding that ſum,

On

The JONGE BASTIAAN. December 12th, 1804.

On the other ſide, it was anſwered, that the action was originally entered only on the part of the firſt ſalvors, and that other ſalvors could not be concluded by any amount that they might affix to their action; but that the objection was untenable even as againſt them, ſince the owners would be equally anſwerable if no bail had been taken.

JUDGMENT.

Sir William Scott.—The whole matter is before the Court, and I think the Court is by no means limited by any particular demand of the parties. This is a caſe of ſalvage of extraordinary merit, and of very long continuance. It was attended with very great danger, and was carried on in oppoſition to the opinion of the maſter himſelf, who repreſented the recovery of the veſſel to be totally impracticable, and diſcouraged the parties from perſevering in the attempt at the peril of their lives. It appears that the veſſel was ſtuck faſt upon a rock, with her bottom beaten in, and her rudder loſt, when the firſt ſalvors went to her aſſiſtance, in a very heavy ſea, and ſucceeded in warping her off. She ſunk afterwards, it is true; but it is not on that account to be ſaid that the firſt ſalvors had loſt her again, or that they had abandoned their intereſt in her. They did not ſtay by the veſſel; but it cannot be ſuppoſed that having riſqued ſo much for her recovery, they meant to deſert her, whilſt others were employed in their ſight, in weighing her up and in ſaving the cargo. If they took no part in thoſe exertions, it could only be becauſe they perceived, that the perſons employed in that ſervice would perform it as well without them. They had

The Jonge Bastiaan.

December 12th, 1804.

been the immediate inſtruments of ſaving her from her original danger, and of bringing her to the place, where theſe other parties were enabled to complete her recovery. I am inclined to throw the ſalvage for the former, as well as the latter ſervices, into hotch-pot, and to give all the perſons concerned equal ſhares. The perſons employed are many, being the crews of ſix or ſeven ſmacks. I ſhall direct them all to ſhare alike, giving the owners and maſters of the ſmacks a double ſhare, and one perſon, whoſe leg was broken in the ſervice, three ſhares.

On the part of the Owners Arnold then objected—That the ſalvage ſhould be given only to the amount of the cargo ſiſhed up; and *that* the bullion, which the maſter had taken away with him, ſhould not contribute.—But the Court over-ruled that objection, and pronounced for a ſalvage of two-thirds of the whole property.

17th *Feb.* 1806. On a ſubſequent day (*a*), an application was made to the Court to reduce the rate of ſalvage, as to certain articles compoſing the claim of one proprietor, on a ſuggeſtion that the actual proceeds did not amount to ſo much as the appraized eſtimate. On the other ſide it was contended, that the parties had taken the property at *bail*, and were concluded by that valuation; that it was according to the amount of that bail that the ſalvors demand was to be ſatisfied.

The Court rejected the Application, and directed the former decree to be carried into execution.

THE

THE RICHMOND, BRATTEL.

December 7th, 1804.

Contraband—Pitch and tar concealed on a deſtination to the *Iſle of France* —Ship and cargo condemned.

THIS was a caſe of an *American* veſſel, ſeized in port by order of the Governor of *St. Helena*, and proceeded againſt as prize to the King in his Office of Admiralty, on the ground that ſhe was going under a falſe deſtination to the *Iſle of France*, with articles of a contraband nature concealed on board, and with a view of ſelling the veſſel there, as a veſſel well adapted for a ſhip of war, and for the ſervice of privateering.

The caſe was argued much at length, as to the effect of the evidence on theſe points.

JUDGMENT,

Sir William Scott.—This is a ſhip which is claimed as an *American* veſſel, by the maſter, deſcribing himſelf as part-owner, in conjunction with another perſon, who is alſo a citizen of *America*. In an affidavit, which enters very minutely into the hiſtory of the voyage, he ſtates, "that the veſſel ſailed on a deſtination to *St. Helena*, from thence to *Mozambique*, on the coaſt of *Africa*, with a deſign of proceeding afterwards with a cargo of ſlaves to the *Havannah*, where the ſhip was to have been ſold, having been originally purchaſed there, though built in *America*." The aſſumed voyage, on this repreſentation, was for the purpoſe of procuring ſlaves, a trade which, I am at liberty to obſerve, is ſtrongly diſcountenanced by the laws of *America*, ſince it was but very lately, that a Proctor appeared in the Court of Appeal, intimating an intention, on the part of the *American* Government, to interpoſe a claim for the proceeds of all cargoes of

The Rebecca.

Dec. 7th, 1804.

ſlaves that ſhould be decreed to be reſtored to *American* ſubjects, as property engaged in a trade, which is ſtrictly prohibited by the laws of that Country. I may, I think, without impropriety, advert to this fact ſo conveyed to the knowledge of the Court.

All the formal papers on board expreſs a deſtination to the *Iſle of France*; but the maſter ſtates, "that there was no original intention of going to that port; that as a clearance could not be expreſſed to *Mozambique*, owing to the reſtriction of the *American* laws as to ſuch a trade, the *Iſle of France* was put in as a convenient place, on that account, and alſo for the purpoſe of avoiding the cruizers that are very numerous off *Mozambique*." In conformity to this repreſentation, there was an agreement on board, ſtating the voyage to be to *St. Helena* and *Mozambique*. There are alſo ſome inſtructions, purporting to be drawn up at ſea by the maſter, for the direction of any perſon who might ſucceed to the command, in caſe of any accident that might happen to himſelf. Theſe expreſs the deſtination to be to *St. Helena*, and from thence to *Mozambique*; and the mariner's contract deſcribes the voyage to have been to *St. Helena* and other places in the *Indian* Seas. Theſe three papers hold out a deſtination to *Mozambique*; but all the other papers on board deſcribe the voyage to have been to the *Iſle of France*, though, according to the maſter's depoſition on the 29th interrogatory, there was no original intention of going there. It does turn out, however, in fact, that at the time of ſeizure, the veſſel was actually going to the *Iſle of France*, and that ſhe was unmoored for the purpoſe of proceeding on that deſtination, having obtained a clearance for that place from the Governor of

St.

The RICHMOND. December 7th, 1804.

St. Helena. At what time this intention was taken up does not appear; there is no notice taken of it in the maſter's affidavit, in which he had an opportunity of explaining all the changes that might have taken place in his mind: There is no mention of it in the proviſional inſtructions, prepared during the voyage by the maſter himſelf, though it certainly muſt have occurred to him, that though he might expect to diſpoſe of his cargo at *St. Helena*, it was ſtill poſſible that he might be diſappointed; and it would have been but a natural precaution, that he ſhould have provided for ſuch an event. Connecting theſe circumſtances together, that the original clearance was to the *Iſle of France*, that at the time of the ſeizure the ſhip was actually going thither, and that it is left in perfect obſcurity at what time that intention was taken up, it is difficult not to conſider the *Iſle of France* as the *poſſible* port of deſtination of this veſſel according to the original intention—I ſay, as *the poſſible port*, at leaſt, if not *the principal*, and *abſolute port* of deſtination of the original voyage. It cannot be denied, undoubtedly, that an *American* ſhip might go to *St. Helena*, and from thence to the *Iſle of France*, or any other port of the enemy, *provided the cargo was of an innocent nature.* If, on the contrary, the cargo was of a noxious character, the circumſtance of merely touching at an *Engliſh* port, would not alter the nature of a voyage in itſelf illegal. It becomes, then, material to conſider what was the nature of the cargo. It conſiſted partly of proviſions, which are certainly innocent. But there were likewiſe on board forty-two barrels of pitch and tar, which, whatever might have been the value of them in *America*, cannot be repreſented as an inconſiderable quan-

The RICHMOND. December 7th, 1804.

tity, with reſpect to the market to which it was going. This quantity of pitch and tar is totally diſſembled in all the papers, in the bills of lading and manifeſt; and yet it is perfectly clear, that it compoſed a part of the cargo, ſince it was ſo deſcribed, in the declaration made at *St. Helena*, for the purpoſe of obtaining permiſſion to ſell. What could have been the reaſon of this concealment? It muſt have been owing to the nature of the articles. If they had been merely ſtores they might have been diſcloſed; but if they were conſidered as part of the cargo, *then*, indeed, it is eaſy to perceive a reaſon for the concealment. In the firſt place, it would be neceſſary to conceal them from the *American* cuſtom-houſe at the exportation, as prohibited articles going on a deſtination to a port of a Belligerent, contrary to the engagements of treaty ſubſiſting between the United States and the Enemy of that Belligerent. It would be neceſſary alſo to diſſemble both to *Engliſh* and to *French* cruizers, ſince, whether going to an *Engliſh* or to a *French* port, they would be liable to ſeizure by the cruizers of either Country reſpectively, who would have a right to conſider ſuch ſupplies carried to an enemy as illegal by the law of nations, and by the particular ſtipulations of treaty. It is aſked, what was to be done under ſuch difficulties? The anſwer is plain and obvious:—Carry as much as is neceſſary for your own uſe, and no more, in violation of the obligations of your country, for any proſpect of advantage to yourſelf. It has been almoſt admitted in argument, as indeed it could not be denied, that if the veſſel had been met by a *Britiſh* cruizer, on the former part of the voyage, ſhe would have been ſubject to condemnation; ſince the avowed deſtination in the papers was to the *Iſle of France*, with a quantity of pitch

The RICHMOND.

December 7th, 1804.

pitch and tar, being contraband articles, on board, and concealed in all the papers relative to the cargo. If ſhe had been met by a *Britiſh* cruizer, it is impoſſible to deny, that the ſhip and whole cargo, belonging to the ſame owner, would have been ſubject to condemnation, without admitting one word to be urged in the way of apology or defence.

Under theſe circumſtances, the ſhip comes to *St. Helena*, on the 23d of *July*, and the maſter almoſt immediately requeſts permiſſion to ſell part of the cargo, or at leaſt ſo much as might enable him to clear his decks. On this part of the caſe, I cannot help obſerving, on the very ſhort time which it ſeems to have taken to accompliſh this object. On the 24th permiſſion is given; on the 29th the ſale is all over, and the veſſel is preparing to go away. *St. Helena*, I am aware, is a ſmall place, and it might not take many days to aſcertain the ſtate of the market. But the cargo muſt have been taken out, becauſe it appears that twelve barrels of tar, which lay at the bottom, were diſpoſed of; or if it is ſuggeſted that thoſe twelve barrels muſt have been on the deck, and no more, it will not add much to the favourable appearance of this tranſaction. So early as the 29th of *July* it is manifeſt from the maſter's own declaration, that the reſolution was entertained of going to the *Iſle of France*, though it does not appear exactly at what time the intention was firſt formed, and it is denied to have made a part of the original plan. About this time, the converſation and conduct of the maſter began to excite the attention of the Governor, and in a manner which does ſeem to call for ſome obſervation from me. It appears, that the veſſel was originally built for a ſhip of war, and was eaſily convertible to warlike

The RICHMOND. December 7th, 1804.

warlike purpoſes; and it is eſtabliſhed (*a*) in evidence, that the maſter converſed with ſeveral perſons on this ſubject, and diſcloſed an intention of ſelling her at the *Iſle of France*. The converſation which the maſter is reported to have held, was to this effect: "That he heard that he was ſuſpected by the Governor, for having ſaid that he would ſell his ſhip at the *Iſle of France*, that he ſhould have no objection to repeat the ſame to the Governor himſelf, for ſuch ſhips were much wanted, and he ſhould ſell her well for a privateer, and buy another upon advantageous terms." The only objection that is made to this evidence is, that it comes from perſons examined in an irregular manner. In admitting ſuch evidence to be read, the Court would certainly not hold itſelf bound by it, in the ſame degree, as by evidence taken in the uſual and regular mode, but it would have been a great ſatisfaction to the Court, to have ſeen any diſclaimer of the imputation on the part of the maſter. No notice is taken of it in his affidavit, or in the letter which he wrote to the Governor; and though the Governor's letter to him had expreſsly charged him with this conduct, as the ground of his detention, no denial or contradiction is oppoſed to it in the maſter's anſwer. Nothing appears there but what is perfectly conſiſtent with his declaration, "That he would repeat the ſame thing to

(*a*) The examinations taken at *St. Helena* contained the depoſitions of ſeveral perſons of character and reputation in that place, as to the conduct and declarations of the maſter.—It was objected againſt the evidence, that it was irregularly taken, and from perſons who were in no manner competent to be introduced as witneſſes in a prize cauſe in the firſt inſtance. But owing to the peculiar nature of the caſe, the Court permitted the depoſitions to be read, ſubject to all obſervation.

the

The RICHMOND.

December 7th, 1804.

the Governor himſelf." Now I cannot admit, that ſuch a converſation was proper to be repeated, or that it did not call for ſome notice and reprehenſion from the Governor. Here was an avowed intention of going to ſell a ſhip to a belligerent; which, in time of war, is at leaſt a very ſuſpicious act—and to do a great deal more, to ſell a ſhip which the neutral owner knew to be peculiarly adapted for purpoſes of war, and with a declared expectation that it would be hoſtily employed againſt this country. It cannot ſurely, under any point of view, but be conſidered as a very hoſtile act, to be carrying a ſupply of a moſt powerful inſtrument of miſchief, of contraband ready made up (*a*), to the enemy for hoſtile uſe, and intended for that uſe by the ſeller, and with an avowed knowledge that it would be ſo applied. It is not altogether improper to obſerve, alſo, on the manner in which this intention was declared; ſince the malignant nature of ſuch a purpoſe was not a little increaſed by the indecent levity with which the maſter expreſſed himſelf, "that ſhe would be ſeen *playing round the Eaſt India Company's ſhips in the Bay of Bengal next ſeaſon.*" It is ſurely no breach of charity to impute the moſt unfavourable intentions to ſuch a conduct; and if tranſactions are in themſelves of a queſtionable nature, ſuch declarations are quite ſufficient to determine their true colour and complexion. There was alſo another act of improper behaviour, in the communication which this maſter held with the *French* priſoners at *St. Helena*, and in taking letters from them to be delivered at the *Iſle of France*. In his affidavit he ſays that among the

(*a*) In the caſe of the *Brutus*, *Rutherford*, Lords, *July* 27, 1804, a ſhip, recently built for war, as not fit for commerce, and going to the *Havannah* to be ſold, was condemned as contraband. See farther note in the Appendix.

papers

The RICHMOND. December 7th, 1804.

papers were ſome letters which he openly received in the company of an officer of a *Britiſh Eaſt India* ſhip; that they were delivered up on the 2d of *Auguſt*, and rerurned to him with an aſſurance from the *Britiſh* officers that they were perfectly honourable; and that he had received them knowing nothing of their contents." They were addreſſed to perſons in the higheſt official ſituations at the *Iſle of France*, both civil and military, to whom communications of a political tendency were likely to be made; and if any ſuch aſſurance was given to him, that there was nothing *improper* in taking ſuch letters, I think it was rather *improperly* given, becauſe I cannot but conſider it to have been an act of great indiſcretion in the perſon, who took theſe letters, under ſuch circumſtances as are here deſcribed, without previous permiſſion, and under a total ignorance of their contents. The Governor's letter, I perceive, complains of this conduct; and I cannot but conſider it to have been an act of very officious and undue interference on the part of a neutral maſter.

The ſhip was ſeized by the order of the Governor on the 1ſt of *Auguſt*, and from that time the hand of force was upon her. She was not reſtored to the claimant, nor left at liberty to proceed on her voyage after that time. A negotiation, it ſeems, had originally commenced for the purchaſe of ſome of the proviſions by way of pre-emption; and on an underſtanding founded on the repeated repreſentation of the maſter, that there were not more than nine or ten barrels of tar on board, which the Governor conſented to take. On proceeding to the execution of this agreement, the fact turned out to be, that there were *twenty-nine* barrels on board; and the only anſwer

ſwer or apology that is made for this exceſs is, that the mate had deceived the maſter, as to the quantity before ſold. Could this be the fact? Here is a noxious article found on board; and it is impoſſible that the maſter ſhould not have known how much he had on board when he left *America*. He was indeed bound to know it, and cannot be heard to aver an ignorance of that fact; ſince there would be an end of the treaty, if a maſter could be allowed to ſay, I am going to a belligerent port, but I do not know what I carry; and by that ignorance could be admitted to juſtify the carrying of contraband. The excuſe is equally inadmiſſible, that he did not know how much remained unſold. If he was going to the *Iſle of France*, he was bound alſo to know how much he had on board at that time; otherwiſe a maſter would have nothing to do but to touch at an *Engliſh* port, and under the cover of ignorance carry whatever he pleaſed to the enemy. The very ſtipulations of treaty eſtop him from pleading ignorance in ſuch a caſe. But it is ſaid, that he could have no fraudulent intention, becauſe, as he had entered into an agreement that the Governor ſhould take the whole cargo, the fact would ſpeedily appear that he had ſo many barrels of pitch and tar on board. It may be aſked, Why then did the mate deceive him? If it was a matter not to be concealed, why was any deceit practiſed about it? In the next place it is to be obſerved, that he had reported the ſmaller quantity to the Governor, when he applied for a permiſſion to clear out to the *Iſle of France*, and having made this declaration he might think himſelf bound to adhere to it; or he might hope that upon an agreement to take the whole cargo, the exceſs of quantity would not be rigorouſly examined. The fact, however,

The RICHMOND.

December 7th, 1804.

however, proved otherwiſe: In proceeding to unliver the cargo, the diſcovery is made, that there were twenty-nine barrels on board; an immediate alarm is taken, the unlivery is diſcontinued, and the Governor informs the maſter that he cannot be permitted to proceed farther in the proſecution of his voyage to the *Iſle of France*. At the ſame time a propoſal is made to purchaſe the veſſel; but this offer afterwards went off on a diſpute about the terms.

Upon this collection of facts, three queſtions ariſe: *firſt*, Whether this quantity of pitch and tar could be lawfully carried to the *Iſle of France*, more eſpecially connected as it was with an intention of ſelling the ſhip herſelf alſo, for purpoſes of war, in the enemy's port? This queſtion will depend in ſome meaſure upon another, Whether the quantity could be conſidered as intended for the ſhip's uſe, and only as ſtores? Now I cannot but think that it was more than can fairly be conſidered as ſtores? Perſons are not, under the pretence of a voyage round the world, to carry as much as they pleaſe of articles of this noxious nature, and then ſell them at different ports, where they may immediately become convertible to purpoſes of war. The term *ſtores*, is to be liberally interpreted; but ſtill it muſt be ſo underſtood, as to be capable of ſomething like a definitive conſtruction. Twelve barrels had been before diſpoſed of at *St. Helena* as part of the cargo, and therefore it is quite impoſſible to ſuppoſe that the whole quantity was originally intended *as ſtores*. When it is connected with the act of concealment of the quantity on board, the inference becomes more ſtrong, that the remainder was likewiſe intended for the purpoſe of ſale at the *Iſle of France*. It may be aſked, what a perſon was to do in this

The RICHMOND.

December 7th, 1804.

this ſituation, meaning to act fairly, and being diſappointed of ſelling the whole quantity at *St. Helena?* The anſwer is obvious, He ought to have declared the quantity, and to have requeſted permiſſion to ſell or depoſit for ſale ſuch part as exceeded the proportion of ſtores upon the iſland. Such a precaution will appear ſtill more reaſonable, when we are told that the original value of the whole quantity was not more than ten or fifteen pounds. The inconvenience, or loſs of ſelling a part to diſadvantage there, would have been very trifling; and with this ſmall ſacrifice to the obligations of the treaty, he might have gone on with ſecurity, and without incurring any of the imputations which have been ſince charged upon him. Inſtead of purſuing this prudent conduct, the maſter is induced to miſrepreſent the quantity throughout, whatever be the cauſe of that miſrepreſentation; and, I think, it muſt have been ſo miſrepreſented, for the purpoſe of obtaining a clearance to the *Iſle of France*, which it could not be ſuppoſed that the Governor would have granted, if the whole quantity had been diſcloſed. Having once ſo reported, the maſter was under the neceſſity of adhering to his firſt account, until the actual diſcloſure, and then it was to be ſaid in explanation, that it muſt be taken to be as a miſtake, and that it could not be otherwiſe.

The ſecond queſtion which ariſes from this ſtatement of facts is, Whether the ſeizure was made at a time when the intention of going to the *Iſle of France* was ſufficiently carried into execution? If there was any original deſign of going to the *Iſle of France*, it is clear that the maſter had already completed part of the voyage; and that the veſſel was actually unmoored in further proſecution of it when the ſeizure was made. The original papers

The RICHMOND.

December 7th, 1804.

pers all expreſs a deſtination to the *Iſle of France*, and the fact afterwards turns out to be agreeable to that repreſentation. The coincidence at leaſt is very ſtriking, and affords ſtrong grounds to preſume that the original deſtination was *abſolutely* to the *Iſle of France*. But ſuppoſing that it was only of a ſhifting nature, and that it was merely eventual. *That* in law would be quite ſufficient; and *that* at leaſt muſt be taken to have been the deſign of the parties. The Governor ſuppoſed it to have been more, and that the veſſel came into *St. Helena* only to clear decks, and facilitate her courſe. It is, however, not neceſſary to enquire whether this ſuſpicion of the Governor was well founded, or not; becauſe if the intention was no more than this, "I will go and ſell pitch and tar at *St. Helena*, if I can, and if I cannot, I will go on with them to the *Iſle of France*, and ſell them there," *that* is an unlawful purpoſe; and every ſtep taken in the proſecution of ſuch a deſign is an unlawful act. The interpoſition of an *Engliſh* port would not make it innocent. Part of the projected ſcheme had already been executed; a clearance had been obtained, and the veſſel was actually unmoored, and in proſecution of the latter part of the purpoſe, when the hand of the Governor was laid upon her.

The remaining queſtion is, Whether the illegal act, which I am of opinion did ſufficiently exiſt at the time of ſeizure, has been defeated, or in any degree altered, by any thing which has paſſed ſince between the Governor and the claimant? On this point it might be ſufficient to obſerve, that the Governor had no authority for any ſuch purpoſe; becauſe if the King was entitled to any intereſt by virtue of this ſeizure, if his right was once veſted, no act of this Gentleman, in the capacity of an officer of the *Eaſt India* Company's

ſettlement

ſettlement at *St. Helena*, could diſpoſſeſs the King and defeat his title to confiſcation which had already accrued. It may be farther obſerved alſo on the fact, that the treaty between the Governor and the Maſter proceeded on a ſuppoſition that every thing relative to the cargo was fairly tranſacted, and that the quantity of pitch and tar was not more than ſeven or eight barrels, as repreſented in the maſter's declaration. Grounds of diſſatisfaction might exiſt as to the ſhip, and as to the conduct of the maſter at the iſland, but no ſuſpicion had ariſen as to the cargo, till the unlivery diſcovered this concealed quantity of pitch and tar. Upon this diſcloſure the Governor informed the maſter that he could not be permitted to go on. He directed the ſhip and cargo to be ſeized, and immediately proceeded to take the examinations; and, under the particular circumſtances of the caſe, he acted, in my opinion, wiſely, and warrantably in ſo doing. What the maſter means by ſaying, "that he applied to the Governor to know why his ſhip was ſeized, but that he could get no anſwer," I am at a loſs to conceive, when this very charge was contained in the Governor's letter, and there appears to have been no denial on the part of the maſter. A farther negociation commenced reſpecting the purchaſe of the ſhip, with a lenity on the part of the Governor, which is rather to be deemed exceſſive; becauſe payment for the reſt of the cargo and for the ſhip would be money thrown away, if the pitch and tar were contraband; inaſmuch as the carrying of contraband ſo concealed would work the forfeiture of the ſhip and cargo belonging to the ſame owners. The negociation however goes off; and the ſhip is ſent to this country for legal adjudication, and upon the legal

The RICHMOND.

December 7th, 1804.

reſult of the whole circumſtance, taken together, the caſe is now to be decided. The Governor may have ſeized and releaſed, and agreed to purchaſe, and have ſeized again, *mille modis*, without affecting the real merits of the caſe. If, therefore, the Governor's conduct had been ever ſo inconſiſtent, and had flowed from the moſt ignorant and capricious tyranny, it would be a a conſideration to which I am not at liberty to advert, in deciding the previous queſtion, Whether the claimant's property is liable to condemnation? But, if I was to take upon me to pronounce upon the actions of the Governor, I ſhould ſay, that I ſee nothing in his conduct but an extreme lenity, which has produced the only embarraſſments under which the Caſe labours; ſince, excluſive of theſe embarraſſments, it is a moſt ſimple queſtion. In my opinion theſe embarraſſments are not ſuch as ſubſtantially interfere with the real merits of the caſe. Thoſe merits conſiſt in theſe circumſtances, that this pitch and tar was going with an original deſtination, either *poſitive* or *eventual*, to the *Iſle of France*; that the part owner and maſter profeſſed, and had commenced, his intention of going thither, diſſembling the quantity of theſe articles which he had on board; that he had alſo profeſſed an intention of ſelling his ſhip there, expreſsly for the purpoſe of being uſed as a *French* privateer againſt the commerce of this country; and that nothing but the interpoſition of *Britiſh* authority obſtructed the complete execution of this hoſtile purpoſe. Under this view of the caſe, I am of opinion that the property is ſubject to condemnation. If I am wrong in my deciſion, I am happy to think, that from the nature of the proceedings in this caſe, the parties will have the benefit of two remedies:—They may either reſort

The RICHMOND.

December 7th, 1804.

resort to the Court of Appeal, as in ordinary cases, if I have put too rigorous an interpretation upon the evidence before me; or, as condemnation will pass to the Crown, the property having been taken in port, they may apply immediately to the liberality of the Crown, which is in the habit of granting indulgence in many cases, to mitigate the effect of that sentence of condemnation, which the strict rule of law unavoidably compels me to pronounce.

THE DRIE GEBROEDERS, VANDYK.

December 12th, 1804.

Joint Capture. Plea of constructive Assistance on behalf of a King's Ship, sustained on the fact of being in sight, though at anchor, under the circumstances of the case.

THIS was a case of joint capture, on the demand of His Majesty's cutter the *Swift*, to share in a prize captured 18th *June* 1801, by the boat of the *Fly* privateer, in the road of *Alderney*, in sight of the *Swift*, whilst the privateer and the cutter were both at *anchor, and becalmed.*

On the part of the actual captor, Arnold and Daubeny contended—That the cutter could not maintain a right to share in this capture, since there was not that *animus capiendi*, which is necessary to constitute an interest in prize; still less had she the power of giving assistance, as the ship herself was becalmed, and the commander, Lieutenant *Mounsey*, had taken the boat on shore for the purpose of purchasing Provisions; the prize finding the flood to make where she lay, about eight

The Drie Gebroeders.

Dec. 12th, 1804.

o'clock in the morning had got under way (*a*), and had been purſuing a courſe directly from the *Swift* about an hour before the boat of the *Fly* could put off, which was not till nine o'clock, when the flood began to make where ſhe lay. The prize would have effected her eſcape, before the *Swift* could have been in a ſituation to render any aſſiſtance. There was therefore no act done nor any intention manifeſted, by which the common foundation of conſtructive aſſiſtance, the proſpect of intimidation, or aſſiſtance, could be ſaid to be held out to the different parties, ſo as to entitle the cutter to maintain an intereſt in the capture.

On the part of the Swift, the King's Advocate and Swabey.—It is admitted that the cutter was in ſight at the time of capture, but undoubtedly the preſumption ariſing from that circumſtance may be repelled, as it has been frequently held, by a contrary courſe, and by other circumſtances of a poſitive nature; inaſmuch as acts of a poſitive nature may fairly be taken as a declaration of an intention not to partake or meddle in the ſeizure. But no ſuch inference can ariſe from the mere circumſtance of being at anchor, more eſpecially in a caſe like the preſent, when both the veſſels were in the ſame ſituation, and were waiting for a wind to enable them to make the capture. In ſuch a ſituation the *animus capiendi* muſt be preſumed, and the movement of the prize, if it were admitted,

(*a*) This fact was denied on the other ſide, but it was admitted that the prize was endeavouring to move a little farther from the rocks, when ſhe was ſeized.

would

The DRIE GEBROEDERS. Dec. 12th, 1804.

would not vary the caſe ſo as to defeat the conſequences ariſing from ſuch an intention. It is ſaid, that the lieutenant had gone on ſhore, and by that act might be ſuppoſed to have abandoned all deſign of ſeizing. But taken it in conjunction with the moral certainty that exiſted of the prize not being able to eſcape the *Swift*, when the tide ſet in, it was merely an intermediate act, ſcarcely to be conſidered as a poſtponement of the ſeizure, much leſs as an abandonment of the deſign. The purpoſe of abandonment is alſo contended to be inferred ſtill more ſtrongly from the commander of the *Swift* continuing on ſhore till after the tide had turned again. In ſo doing, it is ſaid, he waved the opportunity of reaching the veſſel, if in fact he had ever entertained the intention of ſending the boat on board at high water. But it muſt be recollected, alſo, that the boat of the *Fly*, which lay nearer, had gone to the prize in the mean time, and that this movement had been perceived by the officer on ſhore. That circumſtance would remove the neceſſity of proceeding to make an actual ſeizure, though it could not affect his right, as a conſtructive captor, to all the benefits uſually attending *the being in ſight* at the time of ſeizure.

JUDGEMENT.

Sir William Scott.—In this caſe it is certain that the privateer was the actual captor, and alſo a meritorious captor, as the object was not effected without conſiderable exertion. It is equally certain, that the King's ſhip was in ſight at the time. On behalf of a King's ſhip, this circumſtance alone is generally held ſufficient to found a claim of joint-capture, and to raiſe a legal

The Drie Gebroeders.

Dec. 12th, 1804.

(a) *Supra*, *La Flore*, p. 269.

preſumption of the *animus perſequendi*, (a) which is not ſo readily attributed to private ſhips of war. They go out principally on ſpeculations of intereſt, and are not called upon to exert thoſe prompt hoſtilities on every occaſion, to which King's ſhips are in duty bound by the nature of their ſervice. As to King's ſhips, however, it is undoubtedly true, that the preſumption may be repelled by contrary circumſtances, tending to ſhew that there was either no knowledge of the capture that was going on, or no intention to partake in it—in fact, that there was no active or conſtructive aſſiſtance. In one caſe, the Lords of Appeal decided, that the act of ſteering a contrary courſe would have the effect of repelling the force of any inference raiſed on the mere preſumption of law; and other caſes might be put, ſhort of that, which would, I conceive, have the ſame effect; as, if a King's ſhip was lying in harbour, utterly ignorant of the occurrence, with her men diſperſed and ſails unſet. In the preſent caſe, for inſtance, if no one had been left on board, cogniſant of what was going on, it might have been a circumſtance that would have juſtified the application of the ſame rule. But the facts upon which this claim is founded are very different. Here was a man of war going towards *Guernſey*, as was the privateer alſo in the ſame courſe; they both came to an anchor, being becalmed, but both entertaining the intention of proſecuting their voyage when a breeze ſhould ſpring up. The Commander of the King's cutter went on ſhore, but it is proved, that before he went he gave orders, "*that the veſſel in ſight might be watched, that at a proper time ſhe ſhould be boarded, and a ſignal ſhould be made to him, if ſhe ſhould weigh anchor.*" It is evident, therefore, that the

prize

The DRIE GEBROEDERS.

Dec 12th, 1804.

prize had been an object of attention to the King's ſhip; and, the maſter adds, that he kept a watch upon her, and kept his ſails hoiſted to be in readineſs, "*if a reſiſtance had been made to the boat which was perceived, to go off to her from the privateer, or if there had been any attempt to eſcape.*" If there is any truth in this evidence, it is impoſſible to contend that there was no intention to purſue. The chief circumſtance on which any reliance has been placed is, that the commanding officer, Lieutenant *Mounſey*, went on ſhore, as he ſays, to reconnoitre the prize, and to perform other ſervices. But, conſidering that ſuch directions were left, and that the ſtate of the winds inſured almoſt a moral certainty of affording aſſiſtance when it ſhould be required, I think much ſtreſs is not to be laid on that fact. The privateer did not put herſelf in motion, but ſent her boat with eight men; and it is to be obſerved, that there were ſeven men on board the prize, who might probably have reſiſted, if it had not been deemed hopeleſs from a view of the aſſiſtance which was to be expected from the cutter. The ſubſequent conduct of the party, alſo, is not immaterial, as ſhewing what was the intention of the *Swift*. (*a*) As ſoon as the wind and tide ſerved, both ſhips got under

(*a*) An objection had been taken to the evidence of the mate of the *Swift*, examined under a releaſe, on the ground that he ſtill confeſſed that he expected to ſhare in the prize. His words were "that the deponent knows that he has by the ſaid releaſe diveſted himſelf of all legal claim to any part of the ſaid capture, but that he expects, ſhould the ſaid *W. Mounſey* ſucceed in this cauſe, that he will be liberal, and ſuffer the deponent to receive his ſhare of the ſaid capture." It was anſwered, that this objection went only to the credit, and not to the competency of

The Drie Gebroe-ders.

Dec. 12th, 1804.

under weigh to proceed to *Guernsey*, and on the very first meeting Lieutenant *Mounsey* took measures to assert his claim. It is not necessary that the eye of the Captain of the King's ship, who was on shore, should be on the vessel at the precise moment of seizure, though, according to some parts of the evidence, even that circumstance was not wanting. It is sufficient that those on board were left with proper directions, and that they exercised a general attention on the object, with a view to the capture, when a proper opportunity should offer. On the facts of this case, I am of opinion that there are no circumstances shewn, which can have the effect of ousting the claim of the King's ship, founded on the general presumptions of law, and, therefore, I shall pronounce for the interest of the *Swift* to share in this capture.

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the witness, and that it had been so held in several cases both in this Court and the Court of Appeal. *Objection over-ruled.* So in the case of the *San Jose*, 5th *Feb.* 1806.—But note the distinction. In the case of the *Amitie*, *Villeneuve*, 21st *Feb.* 1806. The King's Advocate objected to the evidence of one witness, that in his answer to the sixth interrogatory, he had acknowledged, "that he cannot say that he is not interested, inasmuch as he conceives he will be *entitled* to share, if his vessel was pronounced a joint captor, though he had signed a release." *On the other side, Lawrence* contended, That as he was clearly not interested, the effect of his impression was no more an objection in this case, than in those in which the expectation depended only on the bounty of the parties. But the Court rejected the evidence, observing, "I have always understood the distinction in these Courts to be, that if the witness says only that he expects to share from the bounty of the captors, he is not *disqualified* or rendered *incompetent*, whatever may be the deduction of credit to which he is exposed.—But if he thinks himself entitled *in law*, he acts under an impression of *interest*, which renders him *incompetent*, however erroneous that opinion may be."

Instance

Inſtance Court.

Jan. 29th, 1805.

THE THAMES, DRUMMOND.

Caſe of Colliſion, Damages and Coſts.

THIS was a caſe of colliſion, on a ſuit brought by the late maſter and owner of the coble, or fiſhing-ſmack, the *John and Mary*, againſt the owner of the *Thames* ſloop.

The Act of Court alledged that about ten o'clock in the morning of the 11th of *October* 1803, the ſaid coble was off the port of *Great Yarmouth*, ſteering about North North Eaſt, hauled cloſe to the wind, for the purpoſe of getting the land on board, with a freſh breeze from the North Weſt by North, at which time the ſloop (the *Thames*) was ſailing to the ſouthward with the wind free, and drove againſt the ſaid coble, and ſtruck the ſame with ſuch violence on her ſtarboard bow, that the ſaid coble ſoon afterwards ſunk, and was totally loſt, with all her fiſhing nets and three laſts of herrings, ſtores, &c. and that the loſs of the ſaid coble was ſolely occaſioned by the miſconduct of the crew of the ſaid ſloop (*a*). The different

(*a*) On the part of the *Thames*, the circumſtances of the accident were ſtated in the following manner: That the ſaid veſſel, the *Thames*, *Drummond* maſter, ſailed on the 9th of *October* 1803, from *Dundee*, bound to *London*, with a cargo of various goods, and that during the ſaid voyage, to wit, on the 11th of the ſaid month, about ten o'clock A. M. the ſaid ſhip being then between *Eaſtneſs* and *Orfordneſs*, with all her ſails ſet that would ſtand, with

The THAMES.

January 29th, 1805.

different repreſentations of the parties were ſupported by affidavits. As it was a queſtion depending very much

with a freſh breeze of wind from the North Weſt, ſteering Weſt by Weſt, the ſaid *Francis Drummond* being deſirous of learning if there were any *French* privateers on the coaſt, reſolved to ſpeak a fiſhing-coble, which he perceived at about three miles diſtance, on his weather bow, ſtanding to the northward, and for that purpoſe directed the man at the helm of the *Thames* to haul her cloſe to the wind, which was done accordingly. That *Robert Hepburn*, the mate ſoon after waived his hand to the coble, to ſpeak her; that at ſuch time, and until the accident hereafter mentioned happened, there were but two men on the coble's deck; that thereupon the man who was ſteering the coble, inſtead of gradually bearing down and nearing the *Thames*, as he might and ought to have done, put his helm hard a weather, in order, as it appeared, to go athwart hawſe, and to leeward of the *Thames*, than ſailing cloſe by the wind. That the ſaid *Francis Drummond*, conceiving that the coble could ſcarcely clear the *Thames* in that direction, ordered the man who was ſteering the *Thames* to put the helm hard a lee, in order to throw her into the wind, and thereby to avoid the coble, which was immediately done, and the coble thereby paſſed clear of the *Thames* to leeward. It was farther alledged, that if the ſaid coble had continued her then courſe, ſhe could not have come on board of, or received any injury from the *Thames*, but that *while paſſing* the *Thames*, as aforeſaid, the man who was ſteering the coble quitted the helm, without any reaſon for ſo doing, and ran forwards; that the ſteering of the coble being thus deſerted, ſhe came up in the wind, and having great way through the water ſhe ran under the lee and larboard bow of the *Thames*, and ſtruck her own ſtarboard bow againſt the larboard bow of the *Thames*, and ſtruck the latter with ſuch violence, that ſhe ſtove in her own ſtarboard bow. It was farther alledged, that during the whole period of the aforeſaid tranſactions the wind was North Weſt, and not North Weſt and by North, and that if the ſaid coble had been kept in the courſe ſhe was ſteering, when firſt obſerved by the *Thames*, ſhe would have paſſed clear of the *Thames* to windward; and that afterwards when the ſaid coble altered her courſe, with

much upon technical ſkill and experience in navigation, at the application of the parties, the aſſiſtance of a Trinity Maſter was requeſted.

On this day, Captain *Huddart* attended in compliance with the requeſt of the Court, and the caſe was argued upon the evidence of the facts relied on in the different affidavits. Captain *Huddart* being then deſired by the Court to ſtate the impreſſion which the evidence had made upon him, obſerved, "That it did appear to him, that the repreſentation given on the part of the *Thames* was not ſtated in a ſeaman-like manner; that the *Thames* was deſcribed to be ſailing to the South, with a wind from the North Weſt by North, whilſt the coble was coming in a contrary direction; that it was aſſerted, on the part of the *Thames* that ſhe wanted to obtain information of the coble, and to take in ſome herrings from her, but that ſhe did not act in a ſeaman-like manner for that purpoſe; that in attempting this object it did not appear that the *Thames* ever altered a ſail, though it was not to be expected that the information could be ſupplied, and the herrings thrown on board, without any notice being given to the coble of what it was that was wanted; that in his opinion the *Thames* ſhould have been put about, by which means all the

with a view to paſs the *Thames* to leeward, ſhe would have done ſo by the *Thames* putting her helm a lee, as ſhe did, and avoided the accident that happened, if the man who was ſteering her had not, as aforeſaid, deſerted the helm. That the *Thames* was navigated in a proper and ſeaman-like manner, and that the aforeſaid accident aroſe entirely from the unſkilfulneſs, miſmanagement, and negligence, of the maſter of the ſaid coble, or of the man who was ſteering.

danger

The THAMES.

Jan. 29th, 1805.

danger would have been avoided; that it appeared to him that the loſs had been occaſioned by the bold manœuvre of attempting to run the *Thames* all at once along-ſide the coble, which did not appear to have ever altered her courſe: that the particular manner in which the blow was ſtated to have been received on the ſtarboard bow of the coble, from the larboard bow of the *Thames*, could not have happened whilſt the veſſel was paſſing, unleſs owing to the improper courſe and direction in which the *Thames* was ſteered. That, upon the whole, it appeared to him that the accident was owing to the unſeaman-like manner in which the *Thames* was navigated.

JUDGMENT.

Sir William Scott.—The Court is very much obliged to Captain *Huddart* for theſe obſervations. They are ſuch as perfectly concur with the opinion which the Court itſelf would have formed on a more ſuperficial view of the ſubject. It was to be expected from a Gentleman of nautical experience that he would be able to form a judgement on more critical grounds, and that expectation has not been diſappointed. Under theſe obſervations it remains only for the Court to pronounce, That the coble was run down and ſunk by the miſconduct of the *Thames*, and that the loſs which has been ſo occaſioned, muſt be repaired. —Coſts given.

STELLA

STELLA DEL NORTE, COSTA.

Nov. 6, 1804, *Jan.* 29, 1805.

Conjunct Expedition. Claim of Joint Capture, on the part of ſhips detached from the capturing ſquadron, alleged by virtue of the ſpecial nature of the ſervice, and the agreements between the *Auſtrian* General and Lord *Keith* *not ſuſtained.*

THIS was a caſe on the admiſſion of an allegation of joint capture, on the part of the fleet under the command of Lord *Keith*, claiming to ſhare in certain veſſels taken by ſhips detached from that ſquadron to act in concert with the *Auſtrian* forces on the coaſt of *Genoa*, for the purpoſe of driving the *French* forces out of that Country. The ſhip in queſtion and ſeveral other veſſels were captured by his Majeſty's ſhips the *Phaeton*, *Mutine*, and *Camelion*, coaſting along ſhore, in co-operation with the *Auſtrian* forces, after the *Auſtrians* had driven away the garriſon from a battery, under the protection of which theſe veſſels had been lying.

On the part of the claimants, It was contended, That this caſe was diſtinguiſhed from ordinary caſes of captures made by detached ſhips out of ſight of the ſquadron, by the circumſtance of the aſſociated ſervice on which the veſſels were employed, and by the agreement between Lord *Keith* and the commander of the *Auſtrian* forces, "that all *booty* made on that expedition ſhould be divided equally between the *Britiſh* and the *Auſtrian* forces."

On the other ſide, It was denied that there was any thing in the nature of the ſervice to raiſe a diſtinction between this caſe and other captures by a detached

The STELLA DEL NORTE.

Nov. 6, 1804, Jan. 29, 1805.

detached force.—That it was too much to attribute ſuch an effect to the vague terms of the agreement alluded to; more eſpecially as that inſtrument was not before the Court. The general argument being comprized in the obſervations occurring in the judgement, it is deemed unneceſſary to inſert it in detail in a caſe of this deſcription.

JUDGMENT.

Sir William Scott.—This queſtion ariſes on a capture which is ſtated in the allegation to have been made in a *conjunct expedition*, but certainly in an expedition, very much diſtinguiſhed from thoſe which are uſually ſo denominated, and differing in two circumſtances from the caſes of conjunct expedition, which are deſcribed in the Prize Act. The firſt of theſe circumſtances is, that it was a conjunct expedition between his Majeſty's ſea forces, and an Allied Army, which is alone ſufficient to take it out of the operation of the Prize Act, which muſt be ſuppoſed to regard only ſuch expeditions, as are undertaken by his Majeſty's land and ſea forces. A ſecond material circumſtance is, that the proviſions of the Prize Act point particularly to expeditions, againſt ſome fortreſs at land, which is acceſſible by land on one ſide, and by ſea on the other, againſt which, both deſcriptions of force are capable of concurring in one identical operation. This is a caſe totally different; inaſmuch as it is a capture entirely naval, for which, as a caſe of conjunct *operation*, the Prize Act does not provide any rule, and for which I am not aware that any authority can be derived from precedents that have occurred

The STELLA DEL NORTE.

Nov. 6, 1804, Jan. 29, 1805.

occurred in the practice of this Court. As far as the particulars of the case may be taken to be distinctly stated in the allegation, it is a conjunct expedition of a much wider range; it is the case of an army sweeping the shore, and of a fleet sailing along the coast, not pressing on any particular point, but both going on progressively, with a view of affording mutual assistance against a whole Country. It is therefore materially different from ordinary cases in this particular circumstance, that it is not easy to conceive objects of booty or prize, as to which there could be any privity or co-operation between them. Suppose the case of a *Russian* army landed in *France*, and supported, as far as it was capable of receiving assistance, by an *English* fleet upon the coast? Though a general purpose of concert and assistance might subsist between them, there would be many acts and many situations, in which there could be no possibility of co-operation. If the army moved ever so little into the interior with a view of concentrating its force, or of taking a more advantageous position, any booty taken in such a course would be a capture, towards which scarcely any privity, or communication of endeavour, could subsist between the two forces, in comparison with other cases of co operation, pointing to one particular and identical object. So on the other side, whilst the army was ever so little retired, a capture made by the fleet of any ships appearing on the coast, must be an act in which the army could have very little participation. I mention these instances for the purpose of shewing that the present case, in its full extent, is rather of a novel nature, and not falling within the rules of conjunct

The STELLA DEL NORTE.

Nov. 6, 1804, *Jan.* 20, 1805.

junct expeditions, as they are ordinarily applied in this Court. It would at leaſt require ſome conſideration, therefore, before the Court could venture to determine how far the proviſions of the Prize Act are to be applied, in all points, and without reſerve, to govern ſuch a caſe. It is rather a caſe to be ſettled by compact between the parties;—in which it would be extremely deſirable that unanimity ſhould be ſecured, and all cauſe of diſſenſion effectually removed by previous underſtanding and agreement; ſince I am not aware of any principle of law, or of any authority from practice, by which the intereſts of the ſeveral parties have been hitherto aſcertained. Theſe are ſome conſiderations which ariſe on the general view of the caſe, and I advert to them for the purpoſe of intimating how neceſſary it would be for the Court, when it is got on ſuch new ground, to have the facts of the caſe eſtabliſhed with all poſſible preciſion, in order that it may be enabled to ſee more diſtinctly what that ground is. It does not appear to me that the facts are ſufficiently deſcribed in this allegation. No mention is made of the agreement, on which the whole cauſe depends, till the eighth article, and merely in terms of reference as to a paſt tranſaction:—"That it had been agreed by General *Melas*, and Lord *Keith*, by correſpondence, that all booty ſhould be divided between them." At what time this correſpondence paſſed, or what were the exact terms of the agreement, we are not informed. It is certainly very deſirable that the agreement itſelf ſhould be produced, that the Court may be enabled to put its own legal conſtruction upon it. It is only

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ſtated generally, "that there had been ſuch an agreement," and in theſe large terms—"*that the whole booty ſhould be divided.*" In ſuch an expedition as this was, entirely out of the view or contemplation of the Act of Parliament, the Commanders in Chief of the ſeveral parts of the combined forces may, I think, be ſuppoſed with great propriety to be inveſted with ſufficient authority to make ſuch an agreement, as a neceſſary meaſure for preſerving the harmony of the expedition; and if that agreement was confirmed by their reſpective Governments, it is that which this Court would conſider as competent to bind all the parts of that force. It would be neceſſary, however, before any advantage could be derived from the ſtipulations of that agreement, that the agreement itſelf ſhould be very diſtinctly before the Court.

The allegation ſtates, "that *the ſhips took poſſeſſion*, &c." That the army was in any way inſtrumental in this act does not appear, though ſomething of that kind has been thrown out in argument. The allegation goes on to ſtate what I conceive was meant to be a ground of law on which *the other parts of this fleet would be entitled*—ſince this is not a proceeding on the part of the army—"*That they were under the command of Lord Keith.*" Certainly *that* alone would not be ſufficient, *that they were under the ſame command*, if employed on ſeparate ſervices. It is ſtated alſo, "*that they were employed in the blockade of Genoa, and in co-operating with the Auſtrian forces under the command of General Melas.*" Now, on the whole of this deſcription, I think it would be going farther than the authority of any caſe yet determined would warrant, to hold, that all theſe points of co-operation are to be combined in ſuch an unity of purpoſe, as to entitle all the parts of

The STELLA DEL NORTE.

Nov. 6, 1804, Jan. 29, 1805.

that force to ſhare in each other's booty. One part was employed in the blockade of *Genoa*, a ſecond detachment was employed upon the coaſt on one ſide of *Genoa*, and another on the other ſide. To ſay that all theſe ſervices are to be combined in one general co-operation, would be to eſtabliſh a principle of unity in conjunct operations, of a very large ſcale, and far beyond what the Court is warranted to do by the authority of any caſe that has yet been determined. It is ſaid, "that the *Auſtrian* forces were inſtrumental in driving away the garriſon from the forts by which the ſhips had been protected, and that the capture could not have been made by the *Engliſh* ſhips alone, without the operation of the *Auſtrian* army." *That* I think would not be deciſive to ſupport an intereſt. In the caſe of a *Ruſſian* army, which I have already ſuggeſted, the movements of the army, though without reference to that effect, might tend eventually to the ſucceſs of an attack of ſhips on the coaſts, though the movements were taken only for the accommodation of their own plans; yet, on ſuch a remote and accidental aſſiſtance, it would, I think, be difficult to conſtruct a claim of joint intereſt, on the principle of co-operation and conjunct expedition.

There are two ways in which this caſe may be conſidered,—firſt, without any reference to the *Auſtrian* army; and ſecondly, *with reference* to that connection, and the effect of their co-operation. If the caſe is conſidered independent of any connection with the army, and only under the ordinary grounds of capture at ſea, it appears to me that the fleet at large could not eſtabliſh a right to ſhare, though Lord *Keith*, I perceive, ſeems to have entertained a different impreſſion. On the *other* ſup-

The STELLA DEL NORTE.

Nov. 6, 1804, *Jan.* 29, 1805.

poſition, that the event *was* materially connected with the operation of the *Auſtrian* forces, the effect of that circumſtance muſt depend almoſt entirely on the terms of the agreement; and I have already obſerved, that the article pleading the agreement, is not very *diſtinct* or ſpecific in the deſcription of it. As it ſtands at preſent, it ſtates that "the *whole booty ſhould be divided.*" The word *booty*, is in itſelf rather an equivocal term, and in its obvious meaning applies more properly to capture at land, and to the capitulation of towns; without ſome context, to qualify its general ſenſe, it would not, I think, be taken in its ordinary meaning to point to captures at ſea, though Lord *Keith*, very honourably towards the *Auſtrian* army, ſeems to put that interpretation upon it. Another expreſſion is, "*that all articles which came into their hands ſhould be divided.*" That again, is not a very preciſe phraſe; and it is always to be remembered that the *Auſtrian* forces do not ſeem to have put that conſtruction upon it, ſince they are not before the Court in any manner aſſerting a claim on their own behalf, as ariſing out of this agreement. They are ſilent on the ſubject; and by their ſilence, they muſt be conſidered as diſclaiming any intereſt in the captures, and as admitting that they did not underſtand the contract to apply to captures of this nature. In argument, indeed, it has been attempted to account for their *non appearance*; but that is the ſuggeſtion of Counſel only, whilſt on the other hand there is the fact itſelf, *that they do not appear* to put forward any claims on their own behalf. This non-appearance muſt, I think, be taken as a waver or diſclaimer of any ſuch intereſts. I muſt obſerve, alſo, that it is not ſhewn in what

The STELLA DEL NORTE

Nov. 6, 1804, *Jan.* 29, 1805.

manner the agreement was acted upon in other reſpects: Whether in fact it was adhered to, or *renounced* by the principal parties themſelves? Suppoſe a contract between two perſons, A. and B! If it was renounced on the part of B. I do not ſee that it would be competent to other particular perſons under A. that is, in the preſent inſtance, under Lord *Keith*, to ſet up the inſtrument, and demand to have a different principle of diſtribution applied towards *them*, and with reference only to other ſubordinate parties under it, than what would have prevailed, if no agreement had been entered into between the principals, or had been cancelled or become extinct, or had been formally renounced. What the reſult might be of a demand on the part of the *Auſtrian* army, it will be unneceſſary in the preſent inſtance to conſider, becauſe there is no intimation of a claim on their behalf. They are ſilent; and this ſilence muſt be taken as a virtual renunciation of every demand on their part. That being the caſe, I am of opinion that it is not competent to theſe other perſons, compoſing the fleet under Lord *Keith*, to ſet up the agreement, or the effect that might attend it, if directly brought forward and ſubſtantiated, on behalf of the original parties themſelves. I am diſpoſed, therefore, to reject the allegation, as inſufficient in point of law to ſupport the intereſt claimed under it.—Expences allowed by conſent.

DIE

DIE FIRE DAMER, GIESE.

Feb. 16th, 1805.

Damage by wilful negligence of the prize maſter, compenſation.

THIS was a caſe of a claim of coſts and damages, on account of injury ſuſtained by ſtriking on a rock off *Falmouth*, owing to the wilful neglect of the prize-maſter in refuſing to receive advice or take a pilot on board. The proteſt of the neutral maſter ſtated a caſe of great violence on the part of the prize-maſter, who was repreſented to have been in almoſt a continued ſtate of intoxication, and to have been guilty of great cruelty and miſbehaviour to the crew of the captured veſſel. Farther time had been repeatedly given to the owners to defend themſelves againſt this charge. No affidavits being now produced——

On the part of the claimant, Laurence and Robinſon ſtated the damage which had been ſuſtained, and the ill treatment of the crew, and prayed, that the Court would mark this caſe by decree of pecuniary compenſation againſt the owners in the ſame manner as was done in the caſe of the *Puriſſima Conception.* (*a*) Supra, p. 33.

JUDGMENT.

(*a*) The Editor takes this opportunity of introducing the ſequel of that caſe: On the 9th of *April* 1805, it came on again, on the report of the Regiſtrar and Merchants, ſtating the amount of the embezzlement which had taken place, &c On the part of the *Britiſh* Merchant who had acted as Agent in claiming the property, it was prayed that the Court would confirm the Report,

DIE FIRE DAMER.

Feb. 16th, 1805.

JUDGMENT,

Sir William Scott.—I am under the neceſſity of holding this charge to have been ſufficiently proved by the oath of the neutral maſter, unanſwered as it is

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notwithſtanding the *Spaniſh* proprietors were now become enemies, and had no longer a *perſona ſtandi* before the Court: That it would direct the ſum reported to be brought into the Regiſtry, and alſo the COSTS, for the purpoſe of being paid to the *Britiſh Merchant*, as an indemnification for the expences incurred by him in proſecuting the claim. *The King's Advocate* ſtated ſome circumſtances in mitigation, on the part of the captors. — *Court.*—This was a caſe of great miſconduct in the privateer, who made the ſeizure in time of peace, and afterwards delayed for a conſiderable time to bring the caſe to adjudication. When it was brought on, reſtitution was reſiſted on grounds which the Court could not but conſider as wholly untenable. At the time of the former decree, the charge of embezzlement was referred to the Regiſtrar and Merchants, and the queſtion of coſts was reſerved. The Regiſtrar and Merchants now report that there is a deficiency. To the former decree I look back without any diſſatisfaction, conſidering it to be nothing more than what was due to the parties, and to the honour of the country. I am, therefore, diſpoſed to carry that decree into effect to the utmoſt extent, unleſs I am obſtructed by any principle of law that ſhould prevent me from making any decree in favour of perſons, who now ſtand in the condition of alien enemies. But I think I can perceive a mode in which I ſhall avoid all danger of violating any principle of law, and in which I may expect to be ſupported by the authority of Government. I ſhall direct the money to be brought into the Regiſtry to be at the diſpoſal of his Majeſty; and I apprehend it will not be difficult to obtain a licence to enable the claimants to take it out, as a reparation for the injury which the Court has already pronounced them to have received. I ſhall direct the ſum reported as deficient, and alſo the coſts, to be brought into Court.

by

DIE FIRE DAMER.

Feb. 16th, 1805.

by any evidence offered on the part of the owners of the privateer, ſince the cauſe firſt came on in *September* 1803. That damage was actually ſuſtained is indeed admitted by the negociation which the agents of the owners are ſtated to have been at one time diſpoſed to enter into, for the reparation of the injury which the veſſel had received. It muſt, therefore, be pronounced to be a caſe of coſts and damages, and be referred to the Regiſtrar and merchants to report the amount. But the Court will not ſtop here: Owners are farther anſwerable for the proper conduct of the perſons to whoſe care they entruſt the conduct of their privateer. They ought not to put their veſſel into the hands of a perſon capable of being guilty of ſuch outrageous behaviour, as is imputed to the prize-maſter in this inſtance, and is not contradicted. The proteſt was communicated to the owners in an early ſtage of the cauſe, and it was their duty immediately to have uſed all means to exculpate themſelves and their crew (*a*). Since this has not been done, I muſt admit the charge as proved; and I think I deal out very ſcanty juſtice, by condemning them in the ſum of one hundred guineas, to be divided amongſt the crew of the neutral veſſel, which conſiſted of ten perſons. As to the diſtribution of that ſum, I ſhall direct twenty guineas to be given to the maſter, fifteen to the boy who was particularly the object of ill uſage, and the remainder to be divided equally among

(*a*) It was ſaid in excuſe that the prize-maſter and other perſons, on whoſe affidavits alone they could ground any defence, had been abſent ever ſince on a voyage to the *Weſt Indies*.

THE FIRE DAMER.

Feb. 16th, 1805.

the reſt of the crew. It is ſtated, that the privateer which made this capture has been ſince loſt. If that had not been the caſe, I ſhould certainly have directed meaſures to be taken for the forfeiture of her letter of marque.

THE SACRA FAMILIA, GUSAP.

March 14th, 1805.

Decree of removal, on the prayer of the actual captor, ſuſtained, notwithſtanding the oppoſition of an aſſerted joint captor.

THIS was a queſtion ariſing on an application made on behalf of a *Liverpool* privateer, being the actual captor, to have the prize removed to *Liverpool* from *Plymouth*, where ſhe had been brought by a King's ſhip, who had diſpoſſeſſed the privateer, under the pretence of being a joint-captor. A decree had been obtained to that effect on a former day, but a motion was now made on the part of his Majeſty's ſhip the *Uranie*, the aſſerted joint-captor (*a*), praying that the Court would not permit the commiſſion to iſſue.

On the part of the joint-captor, the King's Advocate. —The capture was made ſoon after the declaration of hoſtilities againſt *Spain*: The privateer, who was the actual captor, had not a letter of marque on board againſt *Spain*. The *Uranie* being in ſight at the time, and coming up, took poſſeſſion of the prize, under an erroneous impreſſion, which ſeems to have been very generally entertained by the navy, and which

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(*a*) 11th *June* 1806.—This cauſe came on to be heard on the claim of his Majeſty's ſhip *Uranie*, to ſhare as joint captor, on the plea of *being in ſight*, when the claim was eſtabliſhed.

is

The SACRA FAMILIE

March 14th, 1805.

is ſtated to have ariſen from a miſapprehenſion of the law to that effect, circulated in a late publication (*a*). It does not appear that the maſter of the privateer in any manner oppoſed the meaſures which were purſued on the part of the joint-captor, or that he expreſſed any intention or wiſh to have the prize ſent to *Liverpool*. To remove her to that port would be rather for the convenience of the owners, than for the benefit of the joint-intereſt, in which the King's ſhip, though only a joint-captor, will partake to a much greater extent than the privateer. Under theſe circumſtances, and after an allegation of joint capture has been aſſerted, it is hoped that the Court will not ſanction a meaſure which will take the prize entirely out of the view of the King's ſhip, or if it is thought neceſſary to remove her at all, that the Court will direct the prize to be brought to *London*.

On the other ſide, *Laurence* ſtated—That the commiſſion had been already granted; and ſubmitted, with reference to the circumſtances of the caſe, that ſufficient cauſe was not ſhewn why that decree ſhould be ſuperſeded.

(*a*) "If the State be at war with different States, it is neceſſary that there ſhould be either one commiſſion including all, or ſeparate commiſſions againſt each; otherwiſe, if a captain, having a commiſſion only againſt the *French*, ſhould fall in with and capture a *Spaniard*, ſuch capture could not be condemned in the Admiralty as lawful prize, *but might be taken away by ſuch man of war as ſhould firſt fall in with him.*"—Spirit of Marine Law, by John Maxwell, of the Honourable Society of the Inner Temple, *and late of the Royal Navy*.——This citation is introduced, ſolely for the purpoſe of correcting the erroneous intimation of the laſt clauſe, by the obſervations made upon it in the Judgment; infra, p. 362.

JUDGMENT.

The SACRA FAMILIA.

JUDGMENT.

March 14th, 1805.

Sir W. Scott.—The queſtion before me is, Whether I ſhall carry into effect the decree which has already paſſed, or whether ſufficient cauſe is ſhewn to ſtop the commiſſion which has been granted? It appears that the prize was a *Spaniſh* veſſel of conſiderable value, taken by a *Liverpool* privateer, not having on board a letter of marque againſt *Spain*; but the maſter muſt be preſumed to have ſuppoſed that his owners would be active in their own intereſts, and that they would uſe immediate exertions to arm themſelves with a commiſſion againſt *Spain*. He made the capture expreſsly on the ground of *Spaniſh* hoſtilities, and had in his poſſeſſion the Gazette containing intelligence of that occurrence, and ſhewed it to the maſter of the *Spaniſh* veſſel. The King's ſhip came up after the capture, and diſpoſſeſſed him. I am not diſpoſed to ſay any thing vindictive on this point, as the error ſeems to have been very general in the navy, and to have been derived from ſome publication, which the Gentlemen of that profeſſion have been in the habit of conſidering as legal authority. The fact however is, that the King's ſhip did diſpoſſeſs the privateer, and brought the prize to *Plymouth*, where, on better advice being obtained, the poſſeſſion was, it is ſaid, immediately given up. Proceedings were commenced here on the part of the privateer, no appearance being then given for other parties. A commiſſion of removal was prayed, and was not then oppoſed: Under ſuch circumſtances it was not neceſſary for the actual captor to do more than ſtate his wiſh that the prize might be removed to *Liverpool*; the commiſſion paſſ-

ed,

The SACRA FAMILIA.

March 14th, 1805.

ed, as of courſe, under the uſual proviſions. That the parties ſhould wiſh the prize to be carried to their own port was very natural; and as long as it was not an improper *market*, which *Liverpool* can ſcarcely be ſtated to be, there ſeemed to be no ground of objection on the part of the Court. Had the application been for a removal to a market evidently diſadvantageous, as for inſtance, to *Greenock*, or any other ſuch port, where the convenience of the actual captor would have been conſulted in oppoſition to the *general intereſt*, the caſe would have ſtood on very different grounds. An oppoſition is now given on the part of the joint captor, praying that the prize may not be removed to *Liverpool*, but that it may be brought to *London*. To ſell at *Plymouth* is out of the queſtion; that port cannot be ſuppoſed to afford a very beneficial market. It ſeems indeed to be entirely out of the intention of either of the parties that the prize ſhould remain there; but they are not agreed as to the place to which ſhe ſhall be removed. Now, in ſuch a caſe, I have always underſtood that the actual captor is *potior jure*. Can it be ſaid that, when he is deſirous of ſending the prize to a port not improper, and more commodious for the convenience of the owners, a mere conſtructive captor ſhould be at liberty to defeat that wiſh, by ſuggeſting a market, which may by poſſibility be in ſome reſpects a little more advantageous. To allow ſuch a power to the *conſtructive captor* would be going farther than I ever remember to have been done. If the port to which the prize was intended *to be removed*, had been a port unſuitable in itſelf, or one in which any danger of embez-

The SACRA FAMILIA.

March 14th, 1805.

embezzlement could be apprehended, I have already ſaid that it might afford grounds for an oppoſition of this kind. In the preſent caſe, the only queſtion which could be made is, Whther the privateer expreſſed any intention of ſending the prize to *Liverpool* in the firſt inſtance, or whether it might not have been brought to *Plymouth* with the perfect concurrence of all parties, and whether the actual captor ſhall be called upon to ſhew an original intention of going to *Liverpool?* Becauſe, if no ſuch wiſh was entertained at the time of capture, and the intention of carrying her to *Liverpool* was only lately taken up, in depar. ture from the original plan, it might perhaps juſtify a joint captor to oppoſe ſuch a removal. But on this point I think it muſt be preſumed from the ſituation of the parties and the circumſtances of the caſe, that ſuch an intention was in fact entertained on the part of the actual captor; or if any doubt can be ſuppoſed to exiſt on that head, it is again repelled by the neglect of the joint-captor in not appearing to make any objection to the original application.—I am of opinion that the objection, coming as it does at this late period, is not ſufficient to induce the Court to ſuperſede the commiſſion which has already been decreed, and I have no heſitation in directing the former decree to be carried into effect.

THE

THE MARIA, JACKSON.

Sept. 18th, 1805.

Continuous voyage in the colonial trade of the enemy: Review of former cases. Further proof on the facts of this case.—*Ultimate Reſtitution.*

THIS was a caſe of an *American* ſhip which had come from the *Havannah* to *New Providence*, with a cargo of colonial produce, and was proceeding, when taken, with a conſiderable part of that cargo on board, to the port of *Amſterdam.*

On the part of the captor, the King's Advocate and Laurence adverted to the general principle of law that had been applied to this claſs of caſes; and to the neceſſity of adhering to it, in proportion as the activity employed in this courſe of trade on the part of merchants in *America*, and the intereſts which the enemy (*a*) had derived in encouraging ſuch a trade, became

(*a*) The intereſt which the Enemy ſometimes confeſs themſelves to derive from the aſſiſtance of foreign merchants, protecting by fraudulent devices the commerce between the mother country and their colonies, may be eſtimated by the following extracts from letters found amongſt the papers of the *Orion*, 13th *March* 1806, and written by perſons at *Amſterdam* to their correſpondents at the *Cape of Good Hope.*—"How much it grieves us not to have it in our power to execute the accumulated orders of all our friends, owing to the vexatious ſituation of the times.—The only channel we had, to wit, through *Copenhagen*, which we could avail ourſelves of laſt year, we are now alſo debarred from, owing to a ſtrict interdiction of the *Daniſh* Government not to load any other goods than thoſe which are *bona fide Daniſh* property, *which has prevented our friends as well as all other houſes of repute to be of ſervice to us therein as formerly.* We are not ignorant that there are expeditions made to your remote quarter of the globe, and ſtill farther from other neutral places, but we do not conſider ourſelves juſtified, without ſpecial authority from our employers, to riſk their property in this manner.

In

The MARIA. Sept. 18th, 1805.

ſame every day more manifeſt.—On the facts it was contended, that the courſe of the tranſaction afforded ſufficient grounds to eſtabliſh the original intention. The veſſel had come from the *Havannah* to the port of *America* on the 31ſt *May*, and proceeded again, after ſome neceſſary repairs, on the 20th *July*, with much the larger (*b*) part of the ſame cargo on board to the country of the enemy; that the illegality of the trade attached upon the veſſel alſo, as well as upon the cargo; that it had been ſo held in the caſe of the *Eſſex, Orne*.

On the part of the Claimant, Swabey and Adams contended—That there were circumſtances that pointed to a ſeverance of intention between the preſent

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In the firſt inſtance conſidering the enormous charges, but principally becauſe we are not ſufficiently convinced of the ſolidity and property of the parties concerned. The ſame reaſons prevent us from participating in expeditions by *American* ſhips; experience has taught us that theſe are often marred before their departure from hence, and thoſe upon whoſe honour we might confide, *heſitate to engage in neutralizing, either from a too rigid principle of conſcience, or from ſelf-intereſted motives.*"——In the ſame collection of papers is to be found alſo the following extract of a letter *relative to tranſhipments in America*, dated *Amſterdam*, 24th *Auguſt* 1805, from Meſſrs. *Teyſſett* and Co. to Mr. *G. E. Overbeck*, at the *Cape of Good Hope*: "Several neutrals have been carried into *England*, and the cargoes condemned on the ſlighteſt ſuſpicion, *notwithſtanding the cargoes had been tranſhipped in America, and had paid the inward and outward duty, which might be the means of expoſing our Indian and Cape Friends to great Loſſes.*"

In a late popular publication in *America*, under the ſignature of *Phocion*, the amount of colonial produce, re-exported by means of drawbacks from *America* to *Europe*, as aſcertained by official reports for the laſt year, is ſtated to have been 28 millions of dollars; being in proportion of 28 to 75, (viz. *ſeventy-five millions of dollars*), the amount of the whole imports of the country, according to the ſame official returns.

voyage

voyage and the voyage from the *Havannah*: that ſome coffee, which had compoſed part of the former cargo, had been left in *America*, whilſt other parts of the preſent cargo were taken on freight, and were not expoſed to the objection of having been brought from the colony of the enemy; that as to ſuch parts, the ſhip could not in any manner be ſaid to have been engaged in an illegal voyage; that it did not indeed *follow* that there muſt neceſſarily be a unity of purpoſe as to the voyage of the ſhip, even if the owner ſhould be held to have formed ſuch an original intention, as to the cargo; ſince inſtances frequently occurred in which the deſign as to the cargo was carried into execution by means of tranſhipment, even between veſſels of the ſame owner. In the caſes which had occurred lately, there were particular circumſtances which led to a concluſion as to the unity of each *particular* voyage: but the preſent caſe does not afford any concluſive evidence as to the cargo, and much leſs as to the ſhip; it was one therefore which the Court would think fit to be referred for farther information.

JUDGMENT.

Sir William Scott.—This queſtion ariſes as to a veſſel which had gone to the *Havannah*, and from thence to *New Providence*, where ſhe was refitted, and took on board part of the ſame cargo, with other goods belonging to the ſame owner, and ſome other articles on freight, and was at the time of capture proceeding to *Amſterdam*. On theſe facts two queſtions have been made— Firſt, Whether the goods ſo going are not liable to condemnation? and ſecondly, Whether the ſhip, as concerned in the ſame illegal tranſaction, is not ſubject

to

The MARIA. Sept. 18th, 1805.

to the ſame penalty. It is certainly true that a continued voyage from the colony of the enemy to the Mother Country, or to any other ports but thoſe of the Country to which the veſſel belongs, will ſubject the cargo to confiſcation; and the only point which the Court has to decide is, whether the voyage in queſtion is to be conſidered as a continued voyage or not. It is a queſtion in its nature ſubject to very conſiderable difficulties in particular caſes; and one, on which the Court muſt exerciſe its judgment with great caution on the ſpecial circumſtances which compoſe the ſubſtance of each caſe, and with great care not to attribute more weight to any particular fact that what it juſtly demands. In the caſe of the *Eſſex*, *Orne*, which was decided by the Court of Appeal, the principle of law, by which ſuch caſes are to be decided, was diſtinctly affirmed. It certainly is not a novel principle; and I cannot but expreſs my ſurprize, that it ſhould be repreſented in any place, as I underſtand it has been, that the principle is new. On the contrary, it is an inherent and ſettled principle in all caſes in which the ſame queſtion can have come under diſcuſſion, that the mere *touching* at any port without importing the cargo into the common ſtock of the country, will not alter the nature of the voyage, which continues the ſame in all reſpects, and muſt be conſidered as a voyage to the country, to which the veſſel is actually going for the purpoſe of delivering her cargo at the ultimate port. The *Eſſex*, *Orne*, was in fact the firſt caſe which called for the direct deciſion of the Superior Court; but the ſame doctrine would have been held in any other caſe, if ſuch a caſe had occurred at an earlier period; and caſes had

occurred before, very ſufficient to convey a full admonition upon the ſubject. As the *Eſſex*, however, happened to be the leading caſe on this ſubject, it may not be improper that I ſhould ſtate what I conceive to be the ſubſtance of it. It was the caſe of an *American* veſſel which had gone from *America* to *Liſbon*, where finding the market bad ſhe went on to *Barcelona*, and there took on board a cargo of *Spaniſh* produce for the *Havannah*, under the direction of the agent in *Europe*, "that ſhe ſhould go to the *Havannah*, firſt *touching* at *Salem*, in *America*, where the owner (*a*) reſided, who adopted the plan, and ſent the veſſel on." It appeared clearly to the Court, that it was the intention, originating in the mind of an authorized agent, acting under full powers, that the veſſel ſhould go to the *Havannah*, and that this purpoſe was adopted by the owner; that it was in reality a continued voyage from *Spain* to the *Havannah*; that as to the intention, all doubt was done away by the adoption on the part of the owner, who had the veſſel in his own port, and was fully implicated in the engagement of ſending her on, according to the projected voyage. That was the fundamental caſe—a caſe of a trade from the Mother Country to the Colony, with full knowledge of the circumſtances, and a diſtinct adoption of the purpoſe on the part of the owner. Other caſes have occurred ſince in this Court, which have been determined on their own particular circumſtances; as, indeed, all caſes of this kind muſt be entertained on their own evidence, which may be ſlighter

The MARIA.

Sept 18th, 1805.

(*a*) The claim was given by the Maſter for the ſhip and cargo, as the property of *William Orne*, of *Salem*.

The MARIA.

Sept. 18th, 1805.

caſe. It is *ſomething* alſo, that the goods are not the whole of the former cargo; ſince the inference of original intention is not ſo ſtrong as to goods which compoſe a part only, though a large part of a miſcellaneous cargo, picked up in different places, and belonging to different proprietors. On theſe grounds it does appear to me that the preſent caſe is ſubſtantially diſtinguiſhed from other caſes, determined by the Lords of Appeal, or in this Court, and that it has not the ſame proof to be collected from circumſtances, on which a judicial mind is bound to acquieſce. There is room to let in the ſuppoſition that there might be an intention of ſelling in *America*, and that in conſequence of the failure of that proſpect only, the deſign was taken up of ſending on theſe goods to the *European* market. Without abandoning the principle, or being in the leaſt diſpoſed to let it out to a degree of laxity, which may endanger the ſtability and conſiſtency of the general rule, I think that the claimant may in this caſe be admitted to prove the averment of an intention of ſelling in *America*, which is not ſhewn to be incredible, or inconſiſtent with any circumſtance which is at preſent in evidence before me. As to the other parts of the cargo, on which no queſtion is raiſed, they muſt be reſtored. The queſtion as to the ſhip will ſtand over to wait the judgment, which the Court may ultimately form on the real intention of the owner as to the cargo.

On the 22d of *April* 1806, This cauſe came on again upon farther proof; when it was admitted on the part of the captor, that the proofs were ſufficient, and the Court decreed reſtitution.

THE ANNA, LA PORTE.

The ANNA.

6th, 15th, & 20th *Nov.* 1805.

Claim of territory, eſtabliſhed. Reſtitution, with coſts and damages.

THIS was the caſe of a ſhip under *American* colours, with a cargo of logwood, and about 13,000 dollars on board, bound from the *Spaniſh* main to *New Orleans*, and captured by the *Minerva* privateer near the mouth of the *River Miſſiſſippi*. A claim was given under the direction of the *American* Ambaſſador for the ſhip and cargo, "as taken within the territory of the United States, at the diſtance of a mile and a half from the weſtern ſhore of the principal entrance of the *Miſſiſſippi*, and within view of a poſt protected by a gun, and where is ſtationed an officer of the United States."

On the part of the Captors, Arnold and Robinſon.—The claim of territory, which has been aſſerted in this caſe, involves ſeveral queſtions of fact and of law: Firſt, as to the place of capture; ſecondly, as to the nature of the neighbouring ground—whether it is ſuch as can ſupport a claim of territory; and thirdly, a queſtion as to the time from which the capture is to be dated, whether from the time of actual ſeizure, or from the firſt ſummons, and commencement of the chaſe. As to all theſe points the evidence is very contradictory. The place of capture is deſcribed by the maſter in his depoſitions to have been "about two *Engliſh* miles from land, at the mouth of the *Miſſiſſippi*." The ſecond witneſs ſays, "cloſe to the bar of the *Miſſiſſippi* very near the ſhore;" and the third

The ANNA.

6th, 15th, & 20th Nov. 1805.

witneſs ſays, " near the buoy at the mouth of the River of *New Orleans*." The deſcription which the commander of the privateer gives in his affidavit is, that " about five P. M. 14th *July*, he diſcovered the *Anna* at the diſtance of about nine miles, ſteering north weſt and by north; that he immediately gave chaſe, and about half paſt ſix the *Anna* altered her courſe; that about three quarters paſt ſix he ordered a gun to be fired; that no notice being taken he ordered another, when finding that the *Anna*, inſtead of taking notice, hoiſted her ſtayſail to favour her eſcape, he fired round and grape ſhot till ſhe brought to; that the *Anna* was not within neutral territory, but two miles and a half from the bar of the river, and five miles from *Fort Baliſe*, which is a ſmall fort erected on made land, and is ſurrounded by water for many miles which never ebbs dry." The repreſentation which the maſter of the captured ſhip gives is, " that the place where ſhe was firſt fired upon, is not more than two miles and a half off the ſhore, and the place where the ſhip was anchored when taken, not more than one mile and a half, and both he apprehends and believes within the territory and juriſdiction of the *United States*; that the ſpots marked in the plan or chart, as between the Baliſe or beacon and his ſhip, are ſmall iſlands, which are always dry, and covered with reeds and ſmall ſhrubs, where people go, and that he had been many times, to ſhoot wild fowl and procure eggs, which are there found in great abundance; that the intervening parts are ſhallow water, in part filled up with timber which drifts down the river; that the Baliſe was, during the time of the poſſeſſion of the *Spaniards*, a fort, with ſmall houſes or cabins round the ſame, where cannon were mounted,

ed, and where a Governor reſided, with his wife and family, as alſo pilots for the navigation of the River, and officers of the Cuſtoms, who uſed to viſit all veſſels at their entrance." Upon this ſtatement it appears that the moſt favourable repreſentation of their own witneſſes places the ſituation of the veſſel at the time of the firſt purſuit, but juſt within the bounds uſually aſcribed to the extenſion of territory, at two miles and a half, or ſcarcely leſs than three miles from the nearеſt coaſts and ſhores. The laws of the *United States* on this queſtion are laid down with exact preciſion, and direct (*a*) " that their diſtrict Courts ſhould take cognizance of complaints by whomſoever inſtituted in caſes of captures made within the waters of the *United States*, or within a marine league of the coaſts and ſhore thereof." Conſidering that claims of territory are claims of exception to the general rule of capture, and that they are required to be ſatisfactorily proved, it might be doubted whether, if there was no other point in diſpute, the claimants had ſo clearly brought their caſe within the territory of the *United States*, as to induce the Court to ſuperſede the ordinary rights of war, and decree immediate reſtitution, as on a claim of this peremptory nature. This argument proceeds on a ſuppoſition that the time of capture is to be dated from the time of purſuit, and that the immunity of territory is not violated by the capture of a veſſel which has been chaſed into territory, in the ſame manner as when the veſſel is avowedly lying in a ſtate of protection in the firſt inſtance, and does

(*a*) Act of Congreſs, 4th *June* 1794.

The ANNA.

6th, 15th, & 20th Nov. 1805.

not merely fly to it as a place of refuge, from the operations of the enemy. *The fact* is eſtabliſhed by the evidence. The law on this point, it is apprehended, is ſettled in the practice of this Court, and it is diſcuſſed at length by *Bynkerſhoek* with this reſult, " *Uno verbo, territorium communis amici valet ad prohibendam vim quæ ibi inchoatur, non valet ad inhibendam, quæ extra territorium inchoata, dum fervet opus, in ipſo territorio continuatur.* Qu. Jur. Pub. page 66.—But, as to the nature of the place, is the ſpot within any meaſurable diſtance of what can properly be called coaſts and ſhores? It was not far from the bar of the River, but that is nothing more than a figurative deſcription which has been given to a collection of ſand, which may affect the approach of veſſels at certain times, but has no neceſſary connection natural or artificial with the bounds of territory. That it was not far from the buoys at the mouth of the River is alſo immaterial, as ſuch rights or rather duties of conſervancy over neighbouring waters may in many inſtances prevail, without affording any marks of a territorial juriſdiction. [3 Adm. Rep. page 348.] From what ſpot then is it that the diſtance is to be computed?—Not from the fort of the Baliſe, becauſe that fort was above five miles from the place of actual capture. There is no line of coaſt from which the computation can be made to fall within the proper compaſs. The claimants reſort therefore to theſe iſlands, as they are called on one ſide, or temporary depoſits of *logs* and drift, as they are repreſented on the other, that are brought down by the ſtream of that great River. Can the Court recognize, in ſpots of ſuch an equivocal nature, under the moſt favourable deſcription, the ordinary qualities

The ANNA.

6th, 7th, & 10th Nov. 1805.

qualities of territory? It is to be expected, that the outlines of territory ſhould be fixed and *permanent*, and that they ſhould form a viſible part of the country to which they are aſcribed; it is neceſſary that they ſhould have this conſpicuous permanent character, that neutrals may be affected with the obligation of obſerving them; and ſince the diſtance is reckoned according to the efficacy of protection, that is, within the reach of fire-arms, it might be natural to expect, that the land from which the extenſion is reckoned, ſhould be a place from which this protection can be afforded. The ſpots in queſtion poſſeſs none of theſe ordinary requiſites of territory. In a caſe not entirely diſſimilar to the preſent, the Courts of *America* have adhered to the ſound interpretation of conſidering the coaſts and ſhores of the country to be the viſible and continuous boundaries of land, by deciding againſt the doctrine of extending territory over the ſhoals and ſhallows on their coaſt, which are ſcarcely leſs entitled to be conſidered as the continuation of territory, than the ſpots which are now reſorted to for the ſupport of this claim (*a*). They are not in occu-

(*a*) A reference was made in this part of the argument to the caſe of the *Africaine*, which had appeared in ſome of the *American* public prints, as decided in the Court of Admiralty at *Charleſtown* againſt the pretenſions of the commercial agent of *France*, who had claimed the protection of territory for a capture made by a *Britiſh* privateer the *Garland*, of a *French* corvette, "lying ſix miles from the ſhore, at the ſouth end of *Sullivan Iſland* at anchor off the bar." It was in that caſe contended in argument, that the term Coaſts included all the ſhoals to a certain diſtance; that all Geographers and Surveyors of Sea Coaſts underſtood by Coaſts the ſhoals along the land; that in *Florida* theſe ſhoals extended to the diſtance of twenty miles from the land,

The ANNA.

6th, 15th, & 20th Nov. 1805.

pancy for any purpoſes of habitation; they are not at all times diſtinguiſhable, and when moſt prominent, have ſo little title to reſpect as territory, that they afford no hope of protection, not even a firm footing to any perſon who might have occaſion to ap-

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land, and were within the territorial juriſdiction; that the ſhoals of the bar are in fact a ſunken continuation of the coaſt, and that the diſtance of protection ſhould be reckoned from the outermoſt ſhoal of the bar; that a contrary conſtruction would be attended with great inconvenience and miſchief, by inviting the cruizers of Belligerent countries to take their ſtation off the bar, and obſtruct the ſecurity of the commerce of *America*.

In the Judgment, The Learned Judge over-ruled theſe arguments, and obſerved, That though in a maritime point of view, that interpretation of Coaſts might be correct, yet this conſtruction would be too vague for any Court of Juſtice to adopt on a queſtion of this nature; that as the ſhoals vary along the coaſt, there would be no fixed rule by which the boundary would be aſcertained; the different Diſtrict Coaſts of the *United States* would be obliged to apply various diſtances to the terms of the Acts, which require them to watch over all violations of territory within a marine league from the coaſt. That as this was a new and important queſtion, his Honour had conſidered it with mature deliberation, and was clearly of opinion that the word Coaſts could not have ſuch an operation as the Counſel for the Libellants had given to it; but that it was intended to mean land as far as low water.—The reſult was, that the Bill exhibited in behalf of the *Africaine* was diſmiſſed, but without coſts, as it was deemed the duty of the Commercial Agent of the *French* Republic to bring the ſubject before the Court.——This Note is abſtracted from a long, but probably a very imperfect account of that Caſe, which appeared in the *Charleſtown* papers, and is inſerted here, with the moſt reſpectful deference to the Gentlemen whoſe very able arguments are thus ſummarily ſtated, for the purpoſe of introducing the reſult of a trial, not unconnected with the preſent queſtion, and decided in a manner, highly honourable to the Courts of *America*, and in vindication of the propriety of the conduct of the *Britiſh* cruizers.

proach

proach them. On theſe grounds it is ſubmitted, that the claim of territory is not made out in that clear and diſtinct manner in which claims of this nature ſhould be ſubſtantiated, and that the Court will therefore proceed to diſcuſs the queſtion of property, as to which many defects, and ſome affirmative grounds of ſuſpicion ariſe, [*as ſpecified*], which will make it a caſe of further proof.

On the part of the Claimant, the King's Advocate and Laurence.—This is a claim of territory, alledged in the moſt ſolemn form by the directions of the Ambaſſador of the *United States*, reſident in this country. It is a queſtion which is at all times deſerving of great attention; and is in the preſent inſtance ſupported by ſo many grounds of complaint againſt the conduct of the captors, that the Court cannot fail to conſider it as a caſe of peculiar aggravation, and deſerving to be marked with the *ſevereſt* reprehenſion and puniſhment which the judgment of this Court can inflict. It is not the caſe of a ſhip and cargo avowedly belonging to the enemy, and without any claim to reſtitution, but what ariſes as a matter of exception to the general courſe of law. It is, on the contrary, the caſe of a ſhip clothed with the moſt inconteſtible marks of neutral character, and belonging to the very ſhore which this captor was haunting, in violation of the territory of the country—it is the caſe of a veſſel which could ſcarcely have fallen into his hands, but owing to the *habits* under which the captor had been ſome time acting, of hovering upon the entrance of the River. That this had been the conduct of the privateer, is admitted in the affidavit of the commander himſelf, who, in

The ANNA.

6th, 15th, & 20th Nov. 1805.

deſcribing the courſe of his proceedings in that river, inconſciouſly drops the following expreſſion:— "Whilſt we were ſtanding on and off the *Miſſiſſippi*. (*a*)" A violation of territory ariſing out of ſuch a ſyſtem and continued plan of action, is not only more injurious to the honour and character, but more dangerous to the private trade, of the country aggrieved, and calls for the ſevereſt animadverſion of the Court. If there was any room to doubt as to the exact diſtance at which this particular capture was made, the mere circumſtance that it aroſe out of a continuation of ſuch habits, would be ſufficient to induce the Court to pronounce againſt the legality of ſuch a capture; but the place ſeems not to be ſubject to any ſuch doubt. The affidavit which has been given in by the claimant, in anſwer to the affidavit of the captain of the privateer, deſcribes the courſe of his veſſel to have been along the line of coaſt which is bounded by theſe iſlands, ſo that the ſituation of the veſſel, at the commencement of the chaſe, was as much within the limits of territorial protection as the place of actual ſeizure. But is it a clear point, that the protection of territory is ſuperſeded by a previous chaſe?—No ſuch principle has been eſtabliſhed in the practice of this

(*a*) This became in the ſequel the prominent feature in the caſe, as the Court directed the log-book of the privateer to be introduced to explain that circumſtance, and in the event conſidered it is a principal ground of the ſentence of coſts and damages, which was ultimately pronounced.

Court

Court (*a*); and as to the *dictum* conveyed in the Treatiſe of *Bynkerſhoek* on that ſubject, it muſt be taken to relate to conteſts very different from a capture of this kind. It evidently points to a caſe of previous conteſt of an hoſtile nature, "*dum fervet opus*," and muſt be underſtood only of caſes in which the act in queſtion was wholly unimpeachable on every other ground, and had ariſen only out of the unforeſeen flight of the enemy. The Court will perceive, however, that the place of the firſt purſuit is deſcribed, by reference to the chart, to have been within the limits of territory (*c*). If the Court ſhould be of opinion on the evidence contained in theſe papers, that this was a capture unjuſtifiable in its commencement, abundant cauſe will ariſe, in the ſubſequent conduct of the parties, to aggravate the queſtion of damages which uſually accompany a ſentence of reſtitution, on claims of this deſcription. Having made this capture, the captor ſhould at leaſt have taken the prize to ſome of the prize juriſdictions that are eſtabliſhed in the *Weſt Indies*.

(*a*) The Court ſeemed to intimate an opinion that there had been caſes of this kind—A caſe was cited from the bar of the *John, Patrick*, 29th *July* 1760, in which the juſtification *of a purſuit into the territory alledged*, is ſet out in the Court Book 9, fol. 97, and it appeared afterwards that the ſeizure was not invalidated. The ſhip was condemned, though the particular reaſons of the judgment are not extant.

(*c*) The evidence on this point was contradictory, and appears not to have been taken on either repreſentation as the foundation of the judgment.

But

The ANNA.

6th, 15th, & 20th Nov. 1805.

But all attention to the convenience of the parties, and the demands of public juſtice is utterly diſregarded; the captain is ſeparated from his veſſel, and they are both brought acroſs the *Atlantic* to adjudication in this Court, to the great damage of the ſhip, and with the moſt evident inconvenience and loſs of time to the maſter. Upon theſe grounds it is, that the juſtice of this Court is called upon, to award exemplary compenſation for all the injuries that have been ſo wantonly committed.

15th Nov.

JUDGEMENT.

Sir William Scott.—I certainly ſhall not think proper to detain this ſhip and cargo any longer; becauſe, ſetting aſide the queſtion of territory, the objections to the property are ſo very ſlender, that I may be excuſed from making any particular obſervations upon them. It appears, that the ſhip had been a *Britiſh* prize, and had been in the poſſeſſion of a Mr. *Fletcher*, a ſubject of *New Orleans*, and conſequently a *Spaniard*, during the laſt war; and therefore all that has been ſaid on his appearing to be left in *Spain*, or of the maſter having been employed as the commander of a *Spaniſh* privateer during the laſt war, is nothing to the purpoſe. It is nothing more than what they had a perfect right to do, whilſt *New Orleans* continued a port of the *Spaniſh* poſſeſſions; it lays no ground of ſuſpicion either as to the property, or the national character of the veſſel, in the preſent diſcuſſion. The ſhip appears to have been ſold by Mr. *Fletcher* to another perſon at *New Orleans*, and there is a bill of ſale on board. Then as to the cargo, it is objected that there are not the regular documents, no clearance;

clearance; but the want of theſe ordinary documents is accounted for by the nature of the trade, in which the veſſel had been employed, in ſmuggling tranſactions with the *Spaniſh* main. There are papers on board purporting to contain accounts between the parties, which do, I think, lay a very fair foundation of credit for the repreſentation which the maſter has given of the property. In ſuch a caſe, if there is not the utmoſt formality of proof that might be required in other caſes, I will not add the vexation of ſending parties acroſs the *Atlantic* to *New Orleans* for farther proof. I cannot but ſay, that, taking it at the outſide to be a caſe of farther proof, it was a moſt unadviſed capture. To bring a veſſel ſo much out of her way for the chance only of catching an order for farther proof, is an act of indiſcretion, which, I hope, will not often be committed by thoſe, who are entruſted with His Majeſty's commiſſion. As to the queſtion of coſts and damages, I ſhall take a little time to deliberate upon it.

20th *Nov. Judgment reſumed.*

Sir William Scott.—This ſhip was taken with a cargo of logwood and dollars on a voyage from the *Spaniſh* main to *New Orleans*. The deſtination of the veſſel was not at all conteſted; but the ſeizure was made, as it is expreſſed, in the log-book of the captor, "becauſe there was not any clearance or regiſter on board." Theſe are defects which may certainly if unexplained juſtify a ſeizure. If a veſſel pretending to be an *American* ſhip is without a regiſter, and is carrying a cargo without any clearance, thoſe circumſtances, if they do not receive a fair and credible explanation, may juſtify a captor in bringing ſuch a caſe

to

The ANNA.

6th, 15th, & 20th Nov. 1805.

to adjudication. In this caſe both theſe objections are, I think, ſatisfactorily removed; becauſe the veſſel having been a *Spaniſh* veſſel was therefore not entitled to an *American* regiſter, and there was a ſea letter or certificate of property on board. The cargo having been taken in upon the *Spaniſh* main on a ſmuggling tranſaction, could not have a clearance, or any of the formal documents that are uſual in ordinary voyages. Theſe circumſtances, I have no doubt, were explained by the maſter, who, in his journal, and on his examination, appears to me to have given a fair repreſentation, without any diſpoſition to aggravate matters of complaint againſt the captors. I can have no doubt that theſe explanations were given. And there are documents and papers on board, which, relatively to the nature of the tranſaction, are, I think, abundantly ſufficient. There was therefore no juſtifying cauſe of ſeizure; for as to what is ſtated in one of the affidavits, that the maſter had commanded a *Spaniſh* privateer in the laſt war, it is no more than what he had a perfect right to do. And whether he had on ſome former voyage broken the blockade of *St. Domingo* or not, is perfectly immaterial to the preſent caſe, and can form no part of the conſiderations upon which the ſeizure is to be juſtified.

The ſhip with this cargo on board was brought to *England* for adjudication; and it lies on the captor to exonerate himſelf from the impropriety of this act; becauſe though the inſtructions to cruizers give ſomething of a diſcretion to captors as to the port, to which they are to bring their prize, *to ſome convenient port*, it is a diſcretion which muſt be cautiouſly exerciſed, and with found reaſon, ſo as to be juſtified in the Court before which the caſe is brought. It would be cauſe

of

The ANNA.

6th, 15th, & 20th Nov. 1805.

of infinite vexation, if neutral veſſels taken on ſlight pretences at ſo great a diſtance as the coaſt of *America*, were to be dragged acroſs the *Atlantic* for adjudication; more eſpecially when this Country has eſtabliſhed Courts in different iſlands in the *Weſt Indies*, to prevent inconvenient recurrence to this Court, and to provide for claimants in that part of the world Juſtice at their own doors, that their commerce may be ſubject to as little interruption as poſſible, from the exerciſes of the rights of war, on the part of this country, in thoſe ſeas. At the ſame time there may be circumſtances that would juſtify ſuch a procedure; as if a King's ſhip bound on the public ſervice makes a capture in her courſe, ſuch a veſſel cannot depart from her inſtructions, but muſt proceed upon her original deſtination. That would be a caſe of neceſſity, ariſing out of the public ſervice, for which States muſt make allowance reciprocally. But with reſpect to privateers, I cannot think that any ſuch circumſtances as are here ſet up can be pleaded, as a juſtifying excuſe for ſuch conduct on their part. It is ſaid, "that the cruize had expired, and that it was time to come home." To which the anſwer is, that they ſhould then have abſtained from making any capture, when they could not ſtay to bring the caſe to adjudication in the proper Courts. That the crew were mutinous, will not do—The owner is anſwerable for his crew, and no legal excuſe can be derived to him from their miſconduct. That he had no agent at the *Bahamas* is equally inſufficient; it was his fault, that he had not. If a perſon ſends out a privateer to cruize in the *American* ſeas, it becomes his duty to appoint agents in ſome of the neighbouring ports, to which the law requires, that prizes taken in

The ANNA.

6th, 15th, & 20th Nov. 1805.

that part of the world ſhould be brought to adjudication. The omiſſion of this precaution has evidently been a cauſe of great inconvenience in the preſent caſe, which is at moſt a caſe of further proof, and in which, when an order for farther proof had been made, the claimant would have been entitled to his property on bail, and would have gone about his buſineſs; indeed, I cannot but think that the Court would more probably have decreed immediate reſtitution. Inſtead of that eaſy courſe, the ſhip and cargo are brought to a diſtant part of the world, for the mere chance of an order for farther proof. The ſhip is recorded on the log-book to have been ſeized for defect of papers; but there is more reaſon to ſuſpect that the real cauſe of ſeizure proceeded, *not from what ſhe had* not, but from *what ſhe had*, the 13,000 *dollars* which were on board. Captors muſt underſtand that it is not the value of the cargo, but the want of proof, and the appearance of circumſtances as to the property, that ſhould induce a ſeizure, and that their conduct in this reſpect ſhould not be influenced merely by the ſplendour of a large ſum of money appearing in their ſight.

When the ſhip was brought into this country, a claim was given of a grave nature, alledging a violation of the territory of the United States of *America*. This great leading fact has very properly been made a matter of much diſcuſſion, and charts have been laid before the Court to ſhew the place of capture, though with different repreſentations from the adverſe parties. The capture was made, it ſeems, at the mouth of the River *Miſſiſſippi*, and, as it is contended in the claim, within the boundaries of the United States.

The ANNA.

6th, 15th, & 20th Nov. 1805.

States. We all know that the rule of law on this ſubject is "*terræ dominium finitur, ubi finitur armorum vis*," and ſince the introduction of fire arms, that diſtance has uſually been recognized to be about three miles from the ſhore. But it ſo happens in this caſe, that a queſtion ariſes as to what is to be deemed the ſhore, ſince there are a number of little mud iſlands compoſed of earth and trees drifted down by the River, which form a kind of portico to the main land. It is contended that theſe are not to be conſidered as any part of the territory of *America*, that they are a ſort of "*no mans land*," not of conſiſtency enough to ſupport the purpoſes of life, uninhabited, and reſorted to, only, for ſhooting and taking birds neſts. It is argued that the line of territory is to be taken only from the Baliſe, which is a fort raiſed on made land by the former *Spaniſh* poſſeſſors. I am of a different opinion; I think that the protection of territory is to be reckoned from theſe iſlands; and that they are the natural appendages of the coaſt on which they border, and from which indeed they are formed. Their elements are derived immediately from the territory, and on the principle of alluvium and increment, on which ſo much is to be found in the books of law, *Quod vis fluminis de tuo prædio detraxerit, & vicino prædio attulerit, palam tuum remanet*, (*a*) even if it had been carried over to an adjoining territory. Conſider what the conſequence would be if lands of this deſcription were not conſidered as appendant to the main land, and as comprized within the bounds of territory. If

(*a*) Inſt. L. 2. Tit. 1. § 21.

The ANNA.

6th, 15th, & 20th Nov. 1805.

they do not belong to the United States of *America*, any other power might occupy them; they might be embanked and fortified. What a thorn would this be in the ſide of *America!* It is phyſically poſſible at leaſt that they might be ſo occupied by *European* nations, and then the command of the River would be no longer in *America*, but in ſuch ſettlements. The poſſibility of ſuch a conſequence is enough to expoſe the fallacy of any arguments that are addreſſed to ſhew, that theſe iſlands are not to be conſidered as part of the territory of *America*. Whether they are compoſed of earth or ſolid rock, will not vary the right of dominion, for the right of dominion does not depend upon the texture of the ſoil.

I am of opinion that the right of territory is to be reckoned from thoſe iſlands. That being eſtabliſhed, it is not denied that the actual capture took place within the diſtance of three miles from the iſlands, and at the very threſhold of the river. But it is ſaid that the act of capture is to be carried back to the commencement of the purſuit, and that if a conteſt begins before, it is lawful for a belligerent cruizer to follow, and to ſeize his prize within the territory of a neutral State. And the authority of *Bynkerſhoek* is cited on this point. True it is, that that great man does intimate an opinion of his own to that effect; but with many qualifications, and as an opinion, which he did not find to have been adopted by any other writers. I confeſs I ſhould have been inclined to have gone along with him, to this extent, that if a cruizer, which had before acted in a manner entirely unexceptionable, and free from all violation of territory, had ſummoned a veſſel to ſubmit

mit to examination and ſearch, and that veſſel had fled to ſuch places as theſe, entirely uninhabited, and the cruizer had without injury or annoyance to any perſon whatever, quietly taken poſſeſſion of his prey, it would be ſtretching the point too hardly againſt the captor, to ſay that on this account only it ſhould be held an illegal capture. If nothing objectionable had appeared in the conduct of the captors before, the mere following to ſuch a place as this is, would I think not invalidate a ſeizure otherwiſe juſt and lawful.

But that brings me to a part of the caſe, on which I am of opinion that the privateer has laid herſelf open to great reprehenſion. Captors muſt underſtand, that they are not to ſtation themſelves in the mouth of a neutral River, for the purpoſe of exerciſing the rights of war from that River, much leſs in the very River itſelf. It appears from the Privateer's own log-book that this veſſel has done both; and as to any attempt to ſhelter this conduct under the example of King's ſhips, which I do not believe, and which, if true, would be no juſtification to others, captors muſt I ſay be admoniſhed, that the practice is altogether indefenſible, and that if King's ſhips ſhould be guilty of ſuch miſconduct, they would be as much ſubject to cenſure as other cruizers. It is unneceſſary to go over all the entries in the log. The captors appear by their own deſcription *to have been ſtanding off and on*, obtaining information at the *Baliſe*, overhauling veſſels in their courſe down the River, and making the River as much ſubſervient to the purpoſes of war, as if it had been a river of their own country. This is an inconvenience which the States of *America* are called upon to reſiſt, and which this Court is bound on every principle to diſcourage and

The ANNA.

6th, 15th, & 20th Nov. 1805.

and correct. With reſpect to one veſſel, it appears that the *Bilboa*, under *Spaniſh* colours, and an undoubted *Spaniſh* ſhip had been captured and carried into the River; and it was ſtated in an affidavit which was exhibited to account for the abſence of the uſual witneſſes in that caſe, *that the priſoners had eſcaped.* The cauſe was brought on upon the evidence of the releaſing witneſſes under this repreſentation. It now appears by an entry in this log "*that the priſoners were ſet on ſhore*;"—an act highly unjuſtifiable, in its own nature, independent of the deception with which it has been accompanied. The priſoners are the King's priſoners, and captors are particularly enjoined by the inſtructions (*a*) not to releaſe any priſoners

13th *Auguſt* 1803.

(*a*) "Whereas it has been repreſented to us, that either through miſapprehenſion of, or in diſobedience to, the true intent and meaning of the tenth article of our inſtructions reſpectively bearing date the 17th of *May*, 1803, and the 16th of *June*, 1803; the captains or commanding officers of ſhips having letters of marque and repriſals, have landed their priſoners either at ports where no depots for the reception of priſoners of war are eſtabliſhed, or have otherwiſe neglected to deliver them over to perſons appointed in the ſea port towns to take charge of the priſoners: We, taking the premiſes into conſideration, and apprehending the great inconvenience therefrom to the public ſervice, do hereby ſtrictly direct and enjoin all captains and commanding officers of ſhips and veſſels having letters of marque and repriſals, that they do carry all priſoners taken on board any prizes to ports at which there are or ſhall be eſtabliſhed depots for the reception of priſoners of war, there to deliver over ſuch priſoners to the agents appointed by our commiſſioners of tranſports, or to ſuch other perſon as ſhall be duly appointed to receive and take charge of priſoners of war; and that no commander or any officer of any ſhip or veſſel having a letter of marque

and

ſoners belonging to the ſhips of the enemy, and they violate their duty whenever they do. When I advert to the impoſition that has been put upon the Court in that tranſaction, how can I truſt myſelf to any repreſentation coming from the ſame perſons. Indeed I think, I can perceive ſtrong traits of bad faith running throughout the whole conduct of the captors in the preſent caſe. In anſwer to the complaint that has been made againſt the captors for bringing this prize to *England*, it was ſaid, that it was done at the deſire of the maſter of the captured veſſel; though in the affidavit of the maſter, which is not contradicted, it is ſworn, " that the captors offered to ſet him on ſhore,

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and repriſal, *do preſume, upon any pretence whatever, to land, releaſe, or deliver over any priſoners of war at any other place, or in any other manner than as aforeſaid.*"

The Editor takes this opportunity of ſuggeſting, as a piece of information that may be of important uſe to Gentlemen, with whom the proceedings in Prize Cauſes neceſſarily commence, (the Commanders, and Cruizers of all deſcriptions in the naval ſervice of the Country), that it is not an unfrequent cauſe of diſſatisfaction with the Court, that thoſe who have the management and controul over captured veſſels, omit in many inſtances to attend to the duty enjoined by the general law, and promulged in a declaratory form in theſe inſtructions, with reſpect to the cuſtody of priſoners in general. The effect of this omiſſion is more felt, as it counteracts the very ancient, and almoſt fundamental rule of Prize Proceedings, which requires that the maſter of the captured veſſel, whether an Enemy, or neutral, ſhould be brought in for examination. The Court has invariably withheld its ſentence of condemnation, even in the cleareſt caſes, where this omiſſion has appeared, until it has been ſupplied, or accounted for in a ſatisfactory manner. The inevitable conſequence of ſuch neglect muſt be, in all caſes where it occurs, to retard the benefit that may otherwiſe be expected to reſult from the capture.

but

The ANNA.

6th, 15th, & 20th Nov. 1805.

but that he refuſed to be ſeparated from his cargo." The conduct of the captors has on all points been highly reprehenſible. Looking to all the circumſtances of previous miſconduct, I feel myſelf bound to pronounce, that there has been a violation of territory, and that as to the queſtion of property, there was not ſufficient ground of ſeizure; and that theſe acts of miſconduct have been further aggravated, by bringing the veſſel to *England*, without any neceſſity that can juſtify ſuch a meaſure. In ſuch a caſe it would be falling ſhort of the juſtice due to the violated rights of *America*, and to the individuals who have ſuſtained injury by ſuch miſconduct, if I did not follow up the reſtitution which has paſſed on the former day, with a decree of coſts and damages.

Before the Lords(a) Commiſſioners of Appeal in Prize Cauſes.

The WILLIAM.

March 11th, 1806.

THE WILLIAM, TREFRY.

THIS was a queſtion on the continuity of a voyage in the colonial trade of the enemy, brought by appeal from the Vice Admiralty Court at *Halifax*, where the ſhip and cargo, taken on a deſtination to *Bilboa* in *Spain*, and claimed on behalf of Meſſrs. *W.* and *N. Hooper* of *Marblehead* in the ſtate of *Maſſachuſetts*, had been condemned 17th *July* 1806.

It appeared in evidence, that the ſhip had gone to *Martinique*, where the outward cargo was diſpoſed of; that ſhe then proceeded to *La Guira*, and took on board a cargo of cocoa, the property of the owners, which was brought to *Marblehead* on the 29th *May*, and unladen; that the ſhip was then cleaned and ſlightly repaired, and again took on board the chief part of the former cargo, with ſome ſugars brought from the *Havannah* in other ſhips, and purchaſed by the owners, and ſailed on or before the 7th *June*, upon a deſtination to *Bilboa*. Among the papers was a certificate from the collector of the

(a) The Editor is happy to have it in his power to inſert in his collection of Admiralty Reports, this elaborate Judgment of the Court of Appeal, which contains alſo a reference to all the principal caſes that had occurred before that Court, relating to the continuity of voyages in the Colonial Trade of the Enemy.

The WILLIAM.

March 11th, 1806.

cuſtoms, " that this veſſel had entered and landed a cargo of cocoa belonging to Meſſrs. *W.* and *N. Hooper*, and that the duties had been ſecured agreeable to law, and that the ſaid cargo had been re-ſhipped on board this veſſel bound for *Bilboa*; and that her cargo, conſiſting of cocoa, ſugar, and fiſh, was the property of the ſaid *W.* and *N. Hooper*."

On the 7th *May* 1804, The cauſe came on to be heard before the Lords of Appeal upon the original evidence, when the caſe was argued on the principle of continuity, and the application of that principle to the circumſtances of the preſent caſe, by the King's Advocate and the Attorney General, on the part of the captor, and by Mr. *Dallas* and Dr. *Arnold*, on the part of the appellant. The Lords " pronounced for the appeal, reverſed the ſentence appealed from, and retained the principal cauſe, therein admitted the claim for the ſhip and cargo, pronounced the ſaid cargo, except 70 hogſheads of cocoa and five bags of cocoa to have belonged as claimed, and diſmiſſed the bail given in the Court below to anſwer the appeal in reſpect thereto; but directed farther proof to be made of the importation of the ſaid cocoa into, and exportation from, the port of *Marblehead* in *America*, and the payment of duties thereon, within nine months."

In obedience to that decree farther proof was exhibited, conſiſting of ſundry documents (*a*):

On

(*a*) Atteſtation of *W.* and *N. Hooper*, 7th *November* 1804.

Certificate of *Joſeph Wilſon*, collector of the cuſtoms, ſtating the importation of the goods in queſtion, dated 7th *November* 1804.

Account

The WILLIAM.

March 11th, 1806.

On this proof the cauſe was farther argued; and on the 11th *March* 1806, The judgment of the Court of Appeal was delivered by the Right Honourable Sir *Willam Grant*, Maſter of the Rolls, in the following terms:

JUDGMENT,

Sir *William Grant*.—The queſtion in this caſe is, whether that part of the cargo which has been the ſubject of further proof, and which, it is admitted, was, at the time of the capture, going to *Spain*, is to be conſidered as coming directly from *Laguira* within the meaning of his Majeſty's inſtructions. According to our underſtanding of the law, it is only from thoſe

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Account of bonds given by *William Hooper* and *John Trefry*, to ſecure the duties on the importation of goods on board the *William* from *La Guira*.—Copy of entry of the goods imported in the *William* from *La Guira*, *May* 1800.—Affidavit of the weigher and gauger at *Marblehead*, that he weighed 61,345lbs. which were landed from the *William*, *Trefry*, and that the ſame was put into 102 caſks and five bags. Sworn at *Marblehead*, 7th *November* 1804.—Ships articles between the maſter and the mariner of the *William*, *Trefry*, for a voyage from *Marblehead* to *Martinico*, or elſewhere in the *Weſt Indies*, and back to *Marblehead*, dated *February* 1800.—Bond given by *W. Hooper* and *John Trefry*, to pay to the United States the ſum of 1239 dollars, dated 29th *May* 1800.—Policy of inſurance on the *William* and cargo, from *Marblehead* to the *Weſt Indies*, and from thence to her port of diſcharge in the United States, dated *Salem*, *March* 26th, 1800.—A price current at *Bilboa* the 8th *February* 1800.—Bond entered into, *W. Hooper* and *John Trefry*, in the ſum of 1848 dollars, on the exportation of 79 caſks and five bags of cocoa from *Marblehead* to *Bilboa*, dated *Marblehead*, 5th *June* 1800.

The WILLIAM.

March 11th 1806.

inſtructions that neutrals derive any right of carrying on with the colonies of our enemies, in time of war, a trade from which they were excluded in time of peace. The inſtructions had not permitted the direct trade between the hoſtile colony and its mother country, but had, on the contrary ordered all veſſels engaged in it to be brought in for lawful adjudication; and what the preſent claimants (*a*) accordingly maintain, is not that they could carry

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(*a*) The principal documents exhibited on the part of the claimant are ſubjoined at length, for the purpoſe of exhibiting a more accurate view of the courſe in which the continuous trade between the colonies of the Enemy, and the mother Country has been conducted, as to the forms of importation in *America*.

Atteſtation of the claimants.

"*William Hooper* and *Nathaniel Hooper*, both of *Marblehead*, in the ſtate of *Maſſachuſetts*, in the United States of *America*, merchants, do depoſe and ſay, that they are citizens of the united ſtates, and were born in *Marblehead* aforeſaid, and in the month of *February*, in the year of our Lord eighteen hundred, ſhipped on board the ſchooner *William* belonging to them, whereof *John Trefry* was then maſter, a cargo conſiſting of cod fiſh, ſounds, and lumber, and ordered him to proceed with ſaid cargo from ſaid *Marblehead* to *Martinico*, then in poſſeſſion of the *Britiſh*, in the *Weſt Indies*, and there ſell and diſpoſe of ſaid cargo for caſh, and with the proceeds thereof, and one hundred doubloons which they at the ſame time ſhipped in gold, to proceed to *Laguira* on the *Spaniſh* main, and there lay out the ſame in purchaſing a cargo of cocoa; that the ſaid *Trefry* proceeded on ſaid voyage with ſaid cargo on board from ſaid *Marblehead* to ſaid *Martinico*, and there ſold and diſpoſed of the ſame for caſh, and with the proceeds thereof, and ſaid one hundred doubloons in gold, proceeded to ſaid *Laguira*, and there purchaſed a cargo of cocoa, and having ſhipped ſaid cocoa in bulk on board the ſaid ſchooner, proceeded with it on board from ſaid *Laguira* to *Marblehead* aforeſaid, and *arrived there*

on

carry the produce of *Laguira* directly to *Spain*; but that they were not so carrying the cargo in question, inasmuch

The WILLIAM.

March 11th, 1806.

on the twenty-ninth day of May, in the year of our Lord eighteen hundred, where the said cocoa was entered at the custom-house, and the duties thereon secured to be paid according to law. And these deponents further say, that after entering the said cocoa, and securing the duties thereon, the same was landed in said *Marblehead*, and there inspected and weighed by the officers of the customs, and put into casks and bags, G, and the said schooner and crew discharged, the hands paid off, and the voyage ended, as will appear by the original shipping paper hereto annexed, marked A, (*a*) which they aver to be true and genuine; that the whole of the said cocoa after it was landed was put into casks and bags, and consisted of seventy-nine casks and five bags, which belonged to them, and twenty three casks which were the proceeds of an adventure shipped on board the said schooner by *Robert Hooper* of *Marblehead*, their father, and belonged solely to him. And these deponents further say, that the whole of the duties on the said cocoa (and on one barrel of coffee and one barrel of sugar, the adventures of the master and mate) were secured to be paid by the bond hereto annexed marked B, (*b*) which they aver to be the original bond which was given at the Custom-house to secure said duties, as will appear by the paper writing marked A, annexed to the collector's certificate; that on re-shipping the said cocoa or any part thereof to any foreign port whatever, they were entitled by the laws of the United States to receive a drawback on the same, reserving to the said United States one and one quarter per centum, and on their re-shipping it to *Bilboa*, as is hereinafter mentioned, debentures for the drawback were accordingly issued by the then collector, *Samuel R. Gerry*, who has since been removed from office, for the sum of nine hundred fifty-five dollars and sixty-six cents on their adventure, and the sum of two hundred and fifty-five dollars and ninety cents on their father's adventure, which was afterwards re-shipped by him; that the said debentures were applied to cancel so much of the said impost bond when it became due, the said impost bond amounting in the whole to the sum of twelve hundred and thirty-nine dollars and eighty-two cents. the said debentures to the sum

(*a*) Infra 361.

(*b*) Infra 362.

The WILLIAM.

March 11th, 1806.

inaſmuch as the voyage in which it was taken was a voyage from *North America*, and not directly from a a colony of *Spain*.

What

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of twelve hundred and eleven dollars and fifty-ſix cents. and the balance due on the ſaid impoſt bond to the ſum of twenty-eight dollars and twenty ſix cents. which was paid by them to the ſaid collector in money. And theſe deponents further ſay, that they did not receive any benefit from the remiſſion of duties upon exporting the ſaid cocoa that would not have been received by them or any other perſon, if the ſame had been imported from a *Britiſh* colony or elſewhere. And theſe deponents do further ſay, that for ſeveral years previous to their ſaid ſchooner's ſailing on the voyage aforeſaid they had been engaged in foreign commerce, and employed ſome of their veſſels in the *European* and ſome of them in the *Weſt India* trade; and that when they ordered the maſter of ſaid ſchooner to proceed to *Laguira* and purchaſe cocoa, it was with the ſingle view of bringing it to the United States; and that they then had no intention or expectation *of exporting it in the ſaid ſchooner to Spain*, but *on its arriving at Marblehead, on the twenty-ninth of May eighteen hundred* as before-mentioned, they found it could not be ſold to advantage in this country, and would probably, from the information they had received from the price current hereunto annexed, marked N, incloſed to them by *Ventura Gomez de la Torre* and *Grandſons*, and which they received in the beginning of *May* eighteen hundred, bring a much better price in *Spain*, they determined on ſending it to that market; and having no other veſſel at home in which they could ſend it, they re-ſhipped it on board the ſaid ſchooner *William*, and conſigned the ſame to the maſter, and ordered him to proceed in her to *Bilboa* in the kingdom of *Spain*, and there ſell and diſpoſe of the ſame on their account and riſk, and proceed directly home; that while the ſaid ſchooner was proceeding on her ſaid voyage ſhe was taken and carried into *Halifax* by one of his Britannic Majeſty's ſhips of war, and there condemned as prize. And theſe deponents expreſsly declare, that the afore-mentioned voyage to *Martinico* and *Laguira* was not undertaken with a view or any intention of procuring cocoa, or any produce of a *Spaniſh* colony, and bringing the ſame to the United

States

What then, with reference to this ſubject, is to be conſidered as a direct voyage from one place to another?

The WILLIAM. March 11th, 1816.

States, landing and naturalizing it, and then ſhipping it in the ſame or any other bottom to *Spain*; but that their re-ſhipping the ſaid cocoa for *Bilboa* was altogether accidental, owing to the ſtate of the markets in the two countries aforeſaid, at the time the ſaid ſchooner arrived therewith at ſaid *Marblehead* as is herein-before ſtated; and that if they had exported it to any other foreign port, or had ſold it here, and the purchaſers had exported it, the deponents or ſuch purchaſers would have been entitled to the ſame drawback on exporting the ſame. And theſe deponents do further declare, that the bond hereto annexed, marked O,(*a*) is the original bond given by the ſaid *William Hooper* and *John Trefry* to the United States on exporting ſaid cocoa as before-mentioned, and that the ſame is true and genuine.

(*a*) Infra 362.

I, *Joſeph Wilſon*, collector of the cuſtoms of the United States of *America* for the diſtrict of *Marblehead* and *Lynn*, do hereby certify and atteſt, that on the twenty ninth day of *May* eighteen hundred, the ſchooner *William*, *John Trefry* maſter, entered at the cuſtom-houſe at *Marblehead*, ſixty-one thouſand three hundred and forty-five pounds of cocoa, one barrel of coffee, and one barrel of ſugar, which were imported from *Laguira*, and belonged to *William Hooper* and *Nathaniel Hooper*, of *Marblehead* aforeſaid, who are citizens of the United States. And I do further certify and atteſt, that the afore mentioned cocoa, coffee, and ſugar, were all duly landed from the ſaid ſchooner at *Marblehead*, and that the ſaid *William Hooper* and *John Trefry*, on the twenty ninth day of *May* eighteen hundred, gave bonds to *Samuel R. Gerry*, who was then collector for the diſtrict of *Marblehead* and *Lynn*, (but who has ſince been removed from office) to ſecure the payment of the impoſt duties impoſed by law on the above-mentioned cocoa, coffee, and ſugar, and that the ſaid bonds were paid by debentures that were iſſued by the ſaid collector for the drawback due on the ſaid cocoa on its being exported for *Bilboa*, as is hereafter mentioned, the ſum of twelve hundred and eleven dollars and fifty-ſix cents, and the ſum

Certificate of the collector of the cuſtoms.

The WILLIAM, March 11th, 1806.

another? Nobody has ever ſuppoſed that a mere deviation from the ſtraighteſt and ſhorteſt courſe, in which the

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of twenty-eight dollars and twenty-ſix cents in caſh, being the whole amount of the impoſt duties on ſaid cocoa, all which appears by the books and papers of the ſaid collector now in my cuſtody. And I do further certify and atteſt, that on the fifth day of *June* eighteen hundred, ſeventy-nine caſks and five bags of the above-mentioned cocoa was entered at the cuſtom-houſe in ſaid *Marblehead*, as being exported by the ſaid *William Hooper* and *Nathaniel Hooper* on board the ſchooner *William*, *John Trefry* maſter, for *Bilboa*, and on the ninth day of *June* eighteen hundred, twenty-three caſks more of the ſaid cocoa were entered at the ſaid cuſtom-houſe as being exported by *Robert Hooper* of ſaid *Marblehead*, merchant, on board the ſchooner *Saratoga*, *Ebenezer Graves* junior, maſter, for *Bilboa*. And I do further certify and atteſt, that the bond deſcribed in the paper-writing hereto annexed, marked A, is the true and accurate deſcription of the bond given at the ſaid cuſtom-houſe to ſecure the duties upon the goods imported in the ſchooner *William* therein mentioned; and that the paper-writing hereunto annexed, marked B, is a true and genuine copy of the entry of ſaid goods as made at the ſaid cuſtom-houſe, as alſo appears by the books and papers of the ſaid collector now in my cuſtody. And I do further certify and atteſt, that the ſaid *William Hooper* and *Nathaniel Hooper* and *Robert Hooper* did not pay any export duties on exporting and clearing out the aforeſaid cocoa for *Bilboa*, no part of ſaid goods being by law ſubjected to pay any export duties on their being exported.

It witneſs whereof I have hereto ſet my hand and ſeal of office, at *Marblehead* aforeſaid, this ſeventh day of *November* 1804.

JOSEPH WILSON, Collector.

Account

the voyage could be performed, would change its denomination, and make it ceaſe to be a direct one within

(A.)

Account of bonds given by the claimants, &c.

Account of bonds given by *William Hooper*, merchant, and *John Trefry*, mariner, for goods imported in the ſchooner *William*, *John Trefry* maſter, from *Laguira*, which veſſel entered on the 29th day of *May* 1800, at the Cuſtom-houſe of the port of *Marblehead*.

Date Bonds.	When paid.	No. of Bonds.	Obligors Names	Dollars.	Cts.
1800.	1800.		*William Hooper*,		
May 29th.	*Auguſt* 29.	14	*John Trefry*.	1239	82

(B.)

Entry of goods, &c.

Entry of goods conſigned to captain *William Hooper*, imported in the ſchooner *William*, *John Trefry* maſter, from *Laguira*, *May* 29th, 1800.

Marks.	Numbers.	Packages and Contents		Neat Value.	Drs.	Duty.
	61345 lb.	Cocoa in bulk,	at	2 Cts.	1226	90
B.	1	Barrel Coffee, 178 lb. Nt.	at	5 Cts.	8	90
Do.	1	Barrel Sugar, 201 lb. Nt.	at	2 Cts.	4	02
				Dollars	1239	82

I ſolemnly ſwear that the above entry contains the whole of the goods, wares, and merchandizes imported by me, or to me conſigned, in the ſchooner *William*, *John Trefry* maſter, from *Laguira*, according to my beſt belief and knowledge; and that the invoices thereof now produced, contains, to the beſt of my knowledge and belief, the neat prime coſt thereof; and that if I afterwards diſcover any other or greater quantity than is contained in the above entry I will make due report and entry thereof.

WM. HOOPER.

Certificate

The WILLIAM. *March* 11th, 1806.

within the intendment of the inſtructions. Nothing can depend on the degree or the direction of the deviation

(O.)

Certificate of obligations entered into on re-ſhipment, debenture, &c. *Nov.* 9th 1800.

Know all men by theſe preſents, that we *William Hooper* of *Marblehead*, in the county of *Eſſex*, merchant, principal, and *John Trefry*, of ſaid *Marblehead*, mariner, ſurety, are held and ſtand firmly bound to the United States of *America*, in the ſum of eighteen hundred and forty-eight dollars forty-eight cents, for the payment of which, well and truly to be made, we bind ourſelves, heirs, executors, and adminiſtrators, jointly and ſeverally, by theſe preſents.

Witneſs our hands and ſeals, this fifth Day of *June*, year one thouſand eight hundred.

Whereas captain *William Hooper* imported into the port of *Marblehead* the following merchandize, in the ſchooner *William* of *Marblehead*, *John Trefry* maſter, from *Laguira*, on the twenty-ninth day of *May*, eighteen hundred, to wit:

		Dollars.	Cts.
79 Caſks of cocoa, wt. 47522 lb. at 2 Cents,	-	950	44
5 Bags of cocoa, wt. 878 lb. at 2 Cents,	-	17	56
48400		968	00
	Deduct 1¼ per Cent.	12	10
Granted debenture, No. 95, pay. *Aug.* 29, 1800, for		955	90

and being re-ſhipped by the aforeſaid *William Hooper*, in order to export the ſame in the ſchooner *William* of *Marblehead*, *John Trefry* maſter, now in the port of *Marblehead*, and bound for *Bilboa*.

The conditions of this obligation therefore is ſuch, that if the ſaid merchandize, or any part thereof, be not relanded in any port or place within the limits of the United States, as ſettled by the late treaty of peace, and if the certificates and other proofs required

The WILLIAM.

March 11th, 1806.

viation—whether it be of more or fewer leagues, whether towards the coaſt of *Africa*, or towards that of *America*. Neither will it be contended that the point from which the commencement of a voyage is to be reckoned changes as often as the ſhip ſtops in the courſe of it; nor will it the more change, becauſe a party may chooſe arbitrarily by the ſhips papers, or otherwiſe, to give the name of a diſtinct voyage to each ſtage of a ſhip's progreſs. The act of ſhifting the cargo from the ſhip to the ſhore, and from the ſhore back again into the ſhip, does not neceſſarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected with any purpoſe of importation into the place where it is done: Suppoſing the landing to be merely for the purpoſe of airing or drying the goods, or of repairing the ſhip, would any man think of deſcribing the voyage as beginning at the place where it happened to become neceſſary to go through ſuch a proceſs? Again, let it be ſuppoſed that the party has a motive for deſiring to make the voyage appear to begin at ſome other place than that of the original lading, and that he therefore lands the cargo purely and ſolely for the purpoſe of enabling himſelf to affirm, that it was at ſuch other place that the

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quired by law of the delivery of the ſame at the aforeſaid port of *Bilboa*, or at any port or place without the United States, ſhall be produced at this office within one year from the date hereof, then this obligation ſhall be null and void, but otherwiſe ſhall be and remain in full force and virtue.

WILLIAM HOOPER, (L.S.)
JOHNT REFRY, (L.S.)

Signed, ſealed, and delivered
in the preſence of
PETER GREEN.

The WILLIAM. March 11th, 1806.

goods were taken on board, would this contrivance at all alter the truth of the fact? Would not the real voyage ſtill be from the place of the original ſhipment, notwithſtanding the attempt to give it the appearance of having begun from a different place? The truth may not always be diſcernible, but when it is diſcovered, it is according to the truth and not according to the fiction, that we are to give to the tranſaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his deſire of making it appear to have been ended. That thoſe acts have been attended with trouble and expence cannot alter their quality or their effect. The trouble and expence may weigh as circumſtances of evidence, to ſhew the purpoſe for which the acts were done; but if the evaſive purpoſe be admitted or proved, we can never be bound to accept as a ſubſtitute for the obſervance of the law, the means, however operoſe, which have been employed to cover a breach of it. Between the actual importation by which a voyage is really ended, and the colourable importation which is to give it the appearance of being ended, there muſt neceſſarily be a great reſemblance. The acts to be done muſt be almoſt entirely the ſame; but there is this difference between them.—The landing of the cargo the entry at the cuſtom-houſe, and the payment of ſuch duties as the law of the place requires, *are neceſſary ingredients* in a genuine importation; the true purpoſe of the owner cannot be effected without them. But in a fictitious importation they are *mere voluntary ceremonies*, which have no natural connection whatever with the purpoſe of ſending on the cargo

to

to another market, and which, therefore, would never be reſorted to by a perſon entertaining that purpoſe, except with a view of giving to the voyage which he has reſolved to continue, the appearance of being broken by an importation, which he has reſolved not really to make.

Now what is the caſe immediately before us? The cargo in queſtion was taken on board at *Laguira*. It was at the time of the capture proceeding to *Spain*; but the ſhip had touched at an *American* port. The cargo was landed and entered at the cuſtom-houſe, and a bond was given for duties to the amount of 1239 dollars. The cargo was re-ſhipped, and a debenture for 1211 dollars by way of drawback was obtained. All this paſſed in the courſe of a few days. The veſſel arrived at *Marblehead* on the 29th of *May*; on that day the bond for ſecuring the duties was given. On the 30th and 31ſt the goods were landed, weighed, and packed. The permit to ſhip them is dated the 1ſt of *June*, and on the 3d of *June* the veſſel is cleared out as laden, and ready to proceed to ſea. We are frequently obliged to collect the purpoſe from the circumſtances of the tranſaction. The landing thus almoſt inſtantaneouſly followed by the re-ſhipment, has little appearance of having been made with a view to actual importation; but it is not upon inference that the concluſion in this caſe is left to reſt. The claimants inſtead of ſhewing that they really did import this cargo, have, in their atteſtation, ſtated the reaſons which determined them not to import it. They ſay indeed, that when they ordered it to be purchaſed, "it was with the ſingle view of bringing it to the United States, and that they then had no intention

The WILLIAM.

March 11th, 1806.

or expectation of exporting it in the *ſaid ſchooner* to *Spain.*" Suppoſing that from this ſomewhat ambiguous ſtatement we are to collect that their original intention was to have imported this cargo into *America*, with a view only to the *American* market, yet their intention had been changed before the arrival of the veſſel. For they ſtate that *in the beginning of May* they had received accounts of the prices of cocoa in *Spain*, which ſatisfied them that it would ſell much better there than in *America*, and that they had therefore determined to ſend it to the *Spaniſh* market. Nothing is alledged to have happened between the landing of the cargo and its reſhipment, that could have the leaſt influence on their determination. It was not in that ſhort interval that *American* prices fell, or that information of the higher prices in *Spain* had been received. Knowing beforehand the comparative ſtate of the two markets, they neither tried nor meant to try that of *America*, but proceeded with all poſſible expedition to go through the forms which have been before enumerated. If the continuity of the voyage remains unbroken, it is immaterial whether it be by the proſecution of an original purpoſe to continue it, as in the caſe of the *Eſſex*, or, as in this caſe, by the relinquiſhment of an original purpoſe to have brought it to a termination in *America*. It can never be contended, that an intention to import once entertained is equivalent to importation. And it would be a contradiction in terms to ſay that by acts done after the original intention has been abandoned, ſuch original intention has been carried into execution. Why ſhould a cargo, which there was to be no attempt to ſell in *America*, have been entered at an *American* cuſtom-houſe, and voluntarily ſubjected to the payment

ment of any, even the moſt trifling duty? Not becauſe importation was, or in ſuch a caſe could be intended, but becauſe it was thought expedient that ſomething ſhould be done, which in a *Britiſh* Prize Court might paſs for importation. Indeed the claimants ſeem to have conceived that the enquiry to be made here was, *not*, whether the importation was real or pretended, but whether the pretence had aſſumed a particular form, and was accompanied with certain circumſtances which by ſome poſitive rule were, in all caſes, to ſtand for importation, or to be concluſive evidence of it. And it has, I underſtand, been ſaid that our departure from that ſuppoſed rule in the caſe of the *Eſſex*(*a*), *Orne*, was a ſurprize upon the merchants of *America*, who had by our former deciſions been led to believe, that proof of landing and payment of duties in *America* would, in every caſe, be held abſolutely deciſive of the legality of the voyage.

The WILLIAM. *March* 11th, 1806.

Lords, 22d *June* 1805.

How far even that rule would have been departed from by the deciſion in the caſe of the *Eſſex* will hereafter be conſidered. But after having looked very attentively into all the caſes in which, as far as I am aware, this ſort of queſtion has occurred, I conceive, not only that it will be impoſſible to point out a judgment, in which any ſuch unqualified doctrine has been laid down, but that the judgments antecedent to that in the *Eſſex* had clearly and unequivocally negatived the exiſtence of the alledged rule of deciſion.

The firſt caſe of the kind, that of the *Polly*, *Laſky*, occurred in the High Court of Admiralty, in *February* 1800. The learned Judge of that Court expreſsly diſclaimed the attempt to define what ſhould be deemed univerſally the teſt of a *bonâ fide* importation. He did

The WILLIAM. March 11th, 1806.

did indeed lay great and juſt ſtreſs on the payment of the *American* import duties, which was there ſworn to have been actually made. But ſtill it was as *evidence* of *bonâ fide* importation. The very ſtatement, that the thing in queſtion was the *bonâ fides* of the importation, did of neceſſity exclude the ſuppoſition that one uniform effect was, in all caſes, to be aſcribed to a given ſet of circumſtances, without regard to the manner in which their effect as evidence might be varied by other circumſtances, with which, in different caſes, they might be found contraſted or combined. The firſt caſe of this claſs which I believe came before this board, was that of the *Mercury*, *Roberts*, in *January* 1802. By all the documents found on board, the cargo appeared to have been laden at *Charleſtown*; and among thoſe documents there was an atteſtation ſworn at the cuſtom-houſe, that all the parts of the cargo which were of foreign growth or manufacture, had been legally imported, and the duties thereon paid or ſecured. It came out however, in the depoſitions of the witneſſes examined on the ſtanding interrogatories, that the cargo had been laden at the *Havannah*, and that it never had been landed at *Charleſtown*, the place of the alledged ſhipment. It being evident that the touching at *Charleſtown*, was for the mere purpoſe of giving to the voyage the colour and appearance of having begun there, we affirmed the ſentence of condemnation, without previouſly endeavouring to aſcertain whether any duties had really been paid in *America*. The true nature of the tranſaction being clearly aſcertained, it ſeemed immaterial to enquire, whether the payment of duties had been one of the means employed to diſguiſe it.

The

The next caſe which occurred, was that of the *Eagle, Weeks*, in *May* 1803. By the original evidence it appeared that the cargo had come from *Bilboa* to *Philadelphia*, where it had been landed, and whence it was proceeding in the ſame veſſel to the *Havannah*. The condemnation in the Court below had proceeded on the ground that the cargo was contraband of war. But the only queſtion here was with regard to the continuity of the voyage. As to that, further proof was ordered. We had the landing at *Philadelphia* already in evidence; therefore, according to the ſuppoſed rule, the only other circumſtance, with regard to which proof could be material, was the payment of duties: But we did not ſo limit our enquiry. In order to endeavour to diſcover the real purpoſe and intention of the owner, we called for the orders which he had given concerning the purchaſe and ſhipment of the cargo at *Bilboa*, and alſo for the inſurances made from thence. Had it clearly appeared from thoſe orders or inſurances that the cargo was from the beginning deſtined for the *Havannah*, could it be ſuppoſed that we would pay no regard to that reſult of the enquiry which we had directed, but would aſcribe to the payment of duties ſuch a concluſive effect, as would have rendered every other part of the enquiry perfectly nugatory? When the caſe came back on the further proof, nothing appeared in the letters of orders to ſhew a deſtination to the *Havannah*. No inſurance had been effected on the firſt branch of the voyage. It was poſitively ſworn that the import duties, amounting to 1333 dollars, *had been actually paid*; alſo that the cargo had been warehouſed at *Philadelphia*, and advertiſed and intended for ſale there, but that not being

The WILLIAM.

March 11th, 1806.

The WILLIAM.

March 11th, 1806.

being able to obtain a price that would anſwer, the owner had reſolved to ſhip it for the *Havannah*. Giving a credit to this evidence which, it now appears, it did not deſerve, we thought that a compleat *bonâ fide* importation had taken place, and therefore decreed reſtitution of the ſhip and cargo.

The caſe of the ſchooner *Freeport*, and the original hearing of the *Eſſex*, *Orne*, came on in *Auguſt* 1803. The *Freeport* had carried from *Cadiz* to *Boſton* the cargo with which at the time of the capture it was proceeding to one of the *Spaniſh* colonies. The cargo had been landed and remained ſome time on ſhore; but the maſter, who was half owner of both ſhip and cargo, admitted in his claim that the cargo was intended for the *Spaniſh Weſt Indian* market, and did not even aſſert any purpoſe of importation into *America*. We therefore affirmed the ſentence of condemnation. The cargo having been landed, it might be taken for granted that whatever duties were payable had been paid. But as the caſe ſtood, we thought that fact immaterial, and therefore directed no enquiry with regard to it.

In the caſe of the *Eſſex* the cargo had been brought from *Barcelona* to *Salem*, and after having been landed and re-ſhipped was proceeding to the *Havannah*. From the original evidence there was great reaſon to believe that the maſter had from the beginning deſtined the cargo for the *Spaniſh* colony; but as what had paſt at *Salem*, or what had been the conduct of the owner after the ſhip's arrival there, did not diſtinctly appear, it was thought right to give him an opportunity of entering into further proof of the alledged im-

portation. It had never been denied that, in a doubtful caſe, payment of duties would have great weight, and therefore the further proof was particularly directed to that point. But it having been ſuggeſted, that in theſe caſes, the duties charged on landing were almoſt entirely drawn back on the re-ſhipment, we alſo called for an account of the drawbacks, if any, which had been received. This additional enquiry ſufficiently ſhewed, that the ſame effect would not be aſcribed to a nominal, as to an actual payment of import duties. With a view of further elucidating the tranſaction, the inſurances made, if any, were directed to be produced. The final event of this caſe will be afterwards noticed.

The WILLIAM. March 11th, 1806.

The next caſe was that which is the immediate ſubject of the preſent judgment. It was firſt heard in *May* 1804. By the original evidence the landing of the cargo at *Marblehead* was proved. It was alſo in proof that the duties had been ſecured according to law. So the owners ſwore—ſo the cuſtom-houſe certified. It was to be ſuppoſed that duties which were ſecured were one day to be paid; and it was doubtleſs meant to be ſo underſtood here: For the fact was ſuppreſſed, that at the moment when the certificate iſſued from the cuſtom-houſe, and the oath was made by the owners, a debenture had been granted, which in effect extinguiſhed almoſt the whole of the duties that had been previouſly ſecured. Here was what is now ſaid to have been by us held concluſive evidence of importation. But what did we determine? That the importation was not ſufficiently proved, and therefore we directed further proof of it to be made. Could any *American*, who at all attended to the proceedings of this Court, be really ſurpriſed by our again deciding

The WILLIAM.

March 11th, 1806.

a twelvemonth afterwards, that ſuch evidence was not concluſive? Yet this effect I mean, of ſurprize, is aſcribed to our deciſion in the *Eſſex*, in *May* 1805. Upon the further proof it appeared to us that no real importation into *Salem* had taken place, or had ever been in the contemplation of the parties to the tranſaction. The ſentence of condemnation was therefore affirmed. As it is not the object of this review of the caſes to diſcuſs the merits of the particular judgments, but only to examine whether there be any inconſiſtency in their principles, it is unneceſſary to advert to any other point in the laſt-mentioned deciſion, than its alledged novelty, in departing from the ſuppoſed principle of holding that landing and payment of duties in *America* did, abſolutely, and under all circumſtances, legalize the ſubſequent voyage. I have ſhewn that there was not one deciſion in which any ſuch principle had been aſſerted or implied, and that there were at leaſt two deciſions which ſtood in direct contradiction to it, that in the *Freeport* in 1803, and that in the *William* in 1804.

But ſuppoſing that we had uniformly held that payment of the import duties furniſhed concluſive evidence of importation, would there have been any inconſiſtency or contradiction in holding that the mere act of giving a bond for an amount of duties, of which only a very inſignificant part was ever to be paid, could not have the ſame effect as the actual payment of ſuch amount? The further proof in the *Eſſex* firſt brought diſtinctly before us the real ſtate of the fact in this particular. It has been already mentioned that we had called for an account of the drawbacks, if any, that had been received. This produced the informa-

tion that although the duties ſecured amounted to 5278 dollars, yet a debenture was immediately afterwards given for no leſs than 5080 dollars; ſo that on that valuable cargo no more than 198 dollars would be ultimately payable, which ſum is ſaid to be more than compenſated by the advantage ariſing from the negotiability of the debenture. In the caſe of the *Eagle*, immediately preceding, it had been ſworn by the owner and certified by the cuſtom-houſe, that the duties, amounting to 1333 dollars, not an unſubſtantial ſum on the not very valuable cargo of a ſmall veſſel of 110 tons, *had been actually paid.* In the *Polly, Laſky*, it was ſworn generally that the duties were paid: In the *Mercury* that they were paid or ſecured: In the *William* that they were ſecured: Not a word was ſaid about drawbacks. It was therefore natural for us to underſtand *American* claimants, as they certainly wiſhed we ſhould underſtand them, to be ſpeaking of the payment of ſuch duties as were chargeable on importation into *America*, and of a ſecurity that would make the whole amount ſecured become payable at ſome future day. If we had aſcribed to the fact, as we believed it to exiſt, ever ſo deciſive an effect, I again aſk where would be the inconſiſtency in denying the ſame effect to a fact of a totally different nature? It muſt not be ſuppoſed that we pretend to judge, what duties it may be proper for the *American* Government to exact or to remit, neither do we contend that an importation cannot be genuine becauſe a high duty has not been paid. All we ſay is, that in the nature of the thing, the payment of a ſlight duty does not tend, in the ſame degree, to eſtabliſh the *bona fides* of an importation, as the payment of a heavy duty would have done. We

The WILLIAM.

March 11th, 1806.

never held that either would neceſſarily outweigh all the evidence which could poſſibly be put into the oppoſite ſcale; but that the one has leſs weight than the other is obvious to every man's apprehenſion.

On the whole, I truſt, I have demonſtrated that we did not, in the caſe of the *Eſſex*, and that we do not, in the caſe now before us, depart from any principle which we have ever adopted. The application to this caſe of the principles on which we really have proceeded has been already ſhewn. The conſequence is that the voyage was illegal, and that the ſentence of condemnation muſt be affirmed.

APPENDIX, Part 2.

ORDER OF COURT.

That in every caſe where Bail is required to be given, in any cauſe depending in this Court, a notice in writing of the perſons propoſed to become bound ſhall be delivered at the office of the adverſe proctor: And no Bail Bond or Recognizance in ſuch cauſe ſhall be taken unleſs the adverſe proctor, or ſome other proctor for him, be then preſent; or an affidavit be exhibited to prove he has had ſuch notice for the ſpace of twenty-four hours, and been required to attend at the time of giving ſuch Bail, for the purpoſe of objecting or conſenting thereto.

5th *Auguſt* 1806.

ADDITIONAL INSTRUCTIONS.

Whereas We have ever been deſirous to prevent interruption being given to the trade and commerce of every ſtate in amity with Us, as far as was compatible with the neceſſary operations of war: And whereas it will tend very much to that purpoſe, that the trade and navigation of the *Baltic* ſhould for the preſent remain unmoleſted: We have therefore been pleaſed to reſolve, that Our ſhips of war, Privateers, and other veſſels acting under Our commiſſion, ſhall be reſtrained from making prize of, ſtopping, or detaining any ſhips or veſſels within the *Baltic*; and We do hereby ſtrictly charge and enjoin the commanders of our ſhips of war, and the Commanders of all ſhips and veſſels

having letters of marque and reprizal, that they do not, by virtue of their commiſſions, or under colour thereof, ſtop or detain any ſhip or veſſel in the *Baltic*, for the purpoſe of making prize of the ſame; but that they ſuffer all ſuch ſhips as they ſhall meet in thoſe ſeas to proceed in their reſpective voyages without any interruption.

By his Majeſty's command,

Spencer.

21 *May* 1806.

ORDER OF COUNCIL.

It is this day ordered in Council, that all Fiſhing Veſſels under *Pruſſian* and other colours, and engaged for the purpoſe of catching fiſh, and conveying them freſh to market, with their crews, cargoes, and ſtores, ſhall not be moleſted on their fiſhing voyages and bringing the ſame to market; and that no fiſhing veſſels of this deſcription ſhall hereafter be moleſted. And the Right Honourable the Lords Commiſſioners of his Majeſty's Treaſury, the Lords Commiſſioners of the Admiralty, and the Judge of the High Court of Admiralty, are to give the neceſſary directions herein as to them may reſpectively appertain.

W. Fawkener.

23 *May* 1806.

APPENDIX.

ADDITIONAL NOTES.

No. I.

BRUTUS. Page 331, Note.

AS it may be ſerviceable to ſtate the circumſtances of this caſe more at length than could be conveniently introduced in the original note, the following more particular reference to *that* and *other* caſes on the queſtion is here ſubjoined. It appeared that the *Brutus* had been recently built at *Saliſbury*, in the ſtate of *Maſſachuſetts*, pierced for fourteen guns, but with only two mounted, to defend her, *as alledged*, againſt *French* privateers; that ſhe had been ſent on the firſt voyage to the *Havannah*, with inſtructions to the maſter, "That he ſhould ſell her or take goods on freight at his diſcretion, but that the owners ſhould prefer the ſale of her rather than freighting her, as ſhe was not calculated for ſuch employ unleſs neceſſitated." On a ſurvey that had been directed at *Halifax*, it was reported "That her hull, maſts, yards, rigging and ſails, appeared in every reſpect as fitted for a ſhip of war; that ſhe had ſhot lockers fitted to each port, and netting ſtantions for ſtowing hammocks for quarters, with nettings fixed fore and aft; that ſhe was pierced for fourteen guns, with ports calculated for guns of four pounds, with rings and eye bolts, and that her ſides were regularly built for quarters, agreeably to the eſtabliſhed way of building, with bow and ſtern-chaſe ports, and a capſtern compleſe for heaving up the anchor inſtead of a windlaſs." The ſentence of the Court (*a*) below expreſſed the reaſon of condemnation to be, that ſhe was built (under an enumeration of particulars) for purpoſes of war and not for peace, and was going to be ſold to the enemy, and condemned the veſſel as contraband of war. The Lords of Appeal affirmed the ſentence, 27th July 1804. A ſpecification of the particulars of that caſe has been *deemed* neceſſary, becauſe in two other caſes (*b*) ſhortly preceding, in which the veſſels were of a more ambiguous conſtruction, yet going to the *Havannah* with directions that they ſhould be ſold there, they had been condemned as contraband in the Vice Admiralty Court of the *Bahamas*; But, on the hearing before the Court of Appeal

(*a*) *Halifax*, 2d *September* 1800.

(*b*) *Fanny, Ingraham*, 24th *March* 1804. *Neptune, Gibbs*, 18th *July* 1804.

peal, in conſideration of the equivocal nature of their character, and the employment in trade, in which they had been actually engaged, and of the occaſion for ſelling ariſing out of the circumſtances attending them, the Lords reverſed the ſentence of the Court below, and decreed reſtitution. In the *Raven*, *Jennings*, (a) a caſe of a ſimilar deſcription, the veſſel had been a *French* privateer, and had been condemned as ſuch at *New York*; but it appeared that the purchaſer had bought her for the purpoſes of trade, and having uſed his beſt endeavours to make her fit for that ſervice, had found her unſuitable, and was on that account intending to ſell her again.

(a) Lords 13th *June* 1804, this veſſel was alſo reſtored on Appeal.

It will appear from the compariſon of theſe caſes, that though the principle of conſidering the ſale of ſhips of war to the enemy as contraband, is ſtrictly held by the deciſions of the Court of Appeal, the application of the principle has been reſtricted to caſes, in which no doubt exiſted as to the character of the veſſels, or the purpoſe for which they were intended to be ſold.

No. 11.

FLAG AND PASS OF THE ENEMY.

VROW ELIZABETH, Prosit. Page 2.

Since the deciſion of the Court of Admiralty in the caſe of the *Vrow Elizabeth*, where the flag and paſs of the enemy was held concluſive againſt the claim for the ſhip on behalf of a neutral proprietor, though adopted prior to hoſtilities, and without any proſpect of ſuch an event, the ſame queſtion has been fully agitated, *before the* Court of Appeal in ſeveral caſes, and with a ſimilar reſult. In the caſe of the *Diana*, *Hunt*, (Lords, 1ſt *March* 1806) the claim of a *Britiſh* merchant for a veſſel ſo employed under a *Dutch* flag and paſs, and not coming within the terms of the Order of Council, ſupra page 7, note, as not ſailing before the knowledge of hoſtilities, but in *September* 1803, was rejected, and the veſſel was condemned.

INDEX.

A.

Page

ADMIRAL of a ſtation—his flag ſhare under the Proclamation — — 215
does not attach, till the communication of *ſome orders*, on ſhips arriving to act under his command — *ib.*
general orders, at the place of rendezvous, ſufficient — 217

Admiralty orders—*preſumption* as to *ſeparate ſervice*, where *co-incident* with the general ſervices of the ſtation — — 216

Amelioration—on *illegal* purchaſes, will *not be continued* — 294

Appendix, Part I. after p. 206, *Inſtructions, as to Colonial Trade, June* 24, 1803.
as to Corn to Spain, February 1, 1805.

Part II. *Order of Court.*
Order of Council, 21 *May* 1806, to reſtrain captures in the *Baltic.*
23 *May* 1806, for protecting fiſhing veſſels.
Notes additional,—as to *ſhips condemned as contraband*—as to flag and paſs concluſive

B.

Bail—order of Court reſpecting notice, &c. *Appendix*, Part II.
for goods delivered, *not* afterwards reduced, to *the amount of the proceeds* — — 295
as to delivery of prize goods — — 296
as to bail in ſalvage caſes — — 296

Blockade—*Elbe & Weſer*, as to an enemy in the interior— 27 & 77
ſubject to all general rules of ordinary blockades 78
miſinformation of Foreign Miniſters as to ceſſation, not available — 80
contingent deſtination to the mouth of the blockaded port, for orders or information, *not allowable* — 80
diſtinction as to *America*, *on what terms* *ib.*

Dieppe, violation by obſtinate declaration and continuance in the prohibited courſe — 289

Havre

Blockade,
Havre, *excuſe*, of *perſiſting* to aſcertain the land, over-ruled — — 258
of *perſevering*, owing to *intoxication*, over-ruled — — 262
inference againſt the cargo, from wilful breach on the part of the maſter — 261, & 7
exceptions, for ſhipments prior to the knowledge of the blockade .. 261, 2
Bottomree—intereſt, on an enemy's ſhip, not a ſubject of claim, in a prize court — — 221
ſuit before the war, but ſuperſeded by plea of *alien enemy*, not tranſferable on the original proceedings to the agent in this country — 105

C.

Cartel—reſcue, by priſoners on board a Cartel ſhip for the purpoſe of being exchanged, *invalidated* — 205
property reſcued decreed to the King, to be diſpoſed of at diſcretion of Government — 206
equity of, allowed, beyond the ſtrict letter, to the extent of the underſtanding between the *Britiſh* and *French* officers — — 199 & 200
Claim—averment of property, *as to time of* ſeizure, and condemnation, not *concluſive* of any queſtion of *character* — — — 249
diſpenſed *with*, as to property of *ſmall* value — 127
ſum fixed, 100*l.* not extended — 128
Colliſion—damages and coſts — — 345
Colonial trade—inſtructions as to the trade allowed, 24th *June* 1803 — *Appendix*, after page 260
continuous voyages, between the colonies of the enemy, and ports not within the inſtructions — — 368 & 387
principle not affected by *a new clearance* or by *mere landing*, and *ſecurity* of duties in *America* — — — 395, 6
review of caſes on this ſubject in the court of appeal — — 399
of *ſome caſes* in the High Court of Admiralty — — 469
Condemnation—of a *French* prize lying in a *Spaniſh* port — 285
diſtinction from the caſe of the *Henric and Maria*, *not ſuſtained* in fact — *ib.*
Contraband—copper in ſheets, reported fit for ſheathing of ſhips — — — 277
maſts, *Ruſſian* produce, *not* in *Ruſſian* ſhips 305 & 313
pitch

INDEX.

Contraband,
pitch and tar, *concealed*, from *America* to the *Iſle of France* — — 325 *& ſeq.*
roſin, to *Nantes*, *not* — — — 98
ſhip of *war*, going to be ſold to the enemy 331
Convenient Port—under the inſtructions to *Privateers* — 144, 384
interpreted *principally* for purpoſes of adjudication — — 144
qualifications, as to King's ſhips — 385
Commiſſion of letter of marque—how affected by miſconduct, 19 & 40
Contract—before the war, and not in contemplation of war, for *Batavian produce*, to be tranſmitted and ſold in *Holland*, *not invalidated* — 163 *& ſeq.*
in proſpect of war, and of *Dutch property*, *in itinere*, *invalidated* — — 131 *& ſeq.*
Convoying ſhip—not precluded from ſalvage, on re-capture of a ſhip being part of her convoy — 318
Crown—not precluded by the prize act from ſuperſeding *prize proceedings*, and directing reſtitution, before adjudication — — — 173 *& ſeq.*

D.

Damage—by colliſion — — — 345
by unſuitable *birth* — — 75
by embezzlement and cruelty — 41 & 358-9
Droits of Admiralty—captures by *boats* manned *as tenders* by *ſhips of war*, but without authority from the admiralty — — 46
diſtinction taken, as to the practice in the *Weſt Indies* — 51
over-ruled by the *Lords*, 282 *note*
captures at *St. Helena* — 325

E.

Eaſt India Company—charter violated by engagements of *Britiſh* merchants, as ſub-contractors, in a foreign adventure *beyond the Cape of Good Hope* — 31, 32
Embargo—hoſtile *ab initio*, according to ſubſequent events 246
Embezzlement—See *Damage*.

F.

Farther proof—double correſpondence, when required — 231
Flag ſhare—See *Admiral*.

Flag and paſs—of the enemy, *concluſive* as to the character of the ſhip — — — 6
bar to the *claim* of an aſſerted *neutral proprietor* — — — 6
not ſo as to *the cargo*, though claimed for the ſame perſon — 52, note
Britiſh ſhip ſo employed condemned — *Appendix*, Part II.
Free ſhips, free goods—quære, as to blockaded property, *though before knowlege* of the blockade on the part of the ſhip — 53
Freight—not *concluded* againſt the captor, as to amount, by the terms of the charter party — 85 *& ſeq.*
decreed to captors, in right of a *prize* ſhip condemned — — — 71
principle to be looked for, in the *ſpecific* performance of the *charter party* 71, 72
exception in favour of a deſtination *virtually* completed. — — 74

I.

Inſtructions—reſpecting trade to the colonies of the enemy, 24th *June* 1803 — *Appendix*, Part I.
for protection of corn going to *Spain* — *ib.*
Intereſt—*upon intereſt*, on an account made up, but ſuſpended by appeal — — — 145
againſt agents, Lords — — 147
prohibition refuſed — — 147, note
Joint capture—*joint chaſing* not neceſſary to be pleaded by *King's ſhips* — — 269
preſumption, unleſs rebutted — *ib.*
being in ſight, not *ſufficiently* proved by witneſſes on board the claiming ſhip — 124
how far neceſſary to prove "*ſeen*" by the *prize*, as well as by the *actual captor* 124
between ſhips *becalmed* and at anchor, in the caſe of a King's ſhip — — 341
claim of a ſquadron to ſhare with detached ſhips, *rejected* — — 350 *& ſeq.*
diſtinctions—from conjunct expedition, and agreement with the *Auſtrian* army, over ruled — — *ib.*
of *Trinidad*, and ſhips lying there 92 *& ſeq.*
times of *capture* ſeparate — 93
claim of ſhips detached, on the *ground* of collateral ſervice, not ſuſtained in *fact* 94
on the ground of having joined again previous to the capture, not proved, as to the ſhips taken and deſtroyed — 95

Joint capture,
as to the iſland, ſupported — *ib.*
time of ſurrender not to be reckoned from the moment of the firſt *overture* — — 96
quære, if, from the *formal* ſignature, or from the ſubſtantial agreement of capitulation — — 96
preſence proved as to *both* — *ib.*

K.

King's ſhip—is not authorized to diſpoſſeſs a privateer, being the actual *captor* — — 274
nor even a non-commiſſioned captor — 9
miſapprehenſion on this point corrected 274
inconvenient conſequences of ſuch a practice — — 274

L.

Letter of marque—proceedings againſt *for miſconduct* — 9, 360
Licence—to *Dutch* ſhips 1801, not applicable to the event of a new war — — — 26
claim on behalf of the *Dutch* government rejected — — — — *ib.*
to *Britiſh* merchant to *import* from *Holland* — 299
will not cauſe to protect a ſhipment made by him in perſon in *Holland*, as *Dutch exporter* 300
to import in a neutral ſhip vitiated, the ſhip being *Britiſh* — — — 14
to import raw materials, will not comprehend lace 141
exception as to this claim, from orders prior to hoſtilities, and want of opportunity of revocation — — — 142

M.

Marines—See *National character—Wages.*

N.

National character—of a Country ceded by treaty, but not transferred, *unaltered* — 113
of *New Orleans*, till *actual delivery*, *Spaniſh* — — — 118
of ſuch inhabitants of *Demerara*, in *June* 1803, as had ſettled there during the late *Britiſh* poſſeſſion — 60

National character,
benefit of the intention of removal allowed to them — 66
of Inhabitants, not *ſettling* in times of *Britiſh* poſſeſſion, *Dutch* — 66
Farther diſcuſſion of their *caſe*, 233 & *ſeq.*
diſtinction, *as to their peace character*, at the time of *ſailing* and actual ſeizure, and their newly acquired *Britiſh* character, at the time of adjudication, over-ruled — *ib.*
averments of the teſt affidavit not concluſive of character — 249
plea of *poſtliminium*, defeated by the *variance of the old and new character* — — 250
of *Britiſh* merchant forcibly detained in *Holland*, but giving proof of intention of removal — — 91
of Mr. *Ravie*, *Britiſh* merchant, *exporting* from *Holland* — — 299
of Mr. *Elmſlie*, not removed from the *Cape of Good Hope* 1804 — 279
of Mr. *Lapiere*, native *Frenchman*, exporting from *St. Domingo* to *France* 99
of mariners, from their ſhip — 9
of *produce* of the claimant's *plantation* in an *enemy's colony*, *deciſive*, notwithſtanding the neutral reſidence of the claimant — — — 21

P.

Part owners—of a privateer, reſponſible *in ſolidum* — 292
releaſe as to *one* will not exonerate *him* — *ib.*
Plantation—produce of, belonging to the claimant—See *National character*. 21
Poſſeſſion—according to the legal title of the bill of ſale — 158
Poſtliminium—variance of the *original* and *acquired* character— 250
Prize act—ſec. 39, "or other ſhip, or veſſel, or boat, under his Majeſty's protection and obedience" — 148
interpretation in ſupport of *non-commiſſioned re-captors right* to ſalvage — 148
reſtitution on *ſalvage* does not apply to property confiſcated by the enemy in peace 1
Proclamation—*ſome orders*—See *Admiralty*.

R.

Regiſtrar—of *Martinique* — — — 160
as to the reſponſibility of the *principal* or *deputy* regiſtrar, for money remitted to *England*—See *Particulars.* — 151
Removal—granted to actual captor — — 360
oppoſition on the part of a joint captor, overruled — — — *ib.*
Reſiſtance—by an *enemy* maſter, will not affect a neutral cargo—232
by *perſons* ignorant of a ſtate of hoſtilities, *not penal* — — — 35
Reſtitution—by the crown before adjudication, p. 17—See *Crown* — — — 173

S.

Salvage—on recapture of neutral property *not generally given* — — — 59
exceptions — — — 59
old caſe conſidered — — 54 & 59
on recapture of a veſſel, by the *convoying* ſhip — 318
on derelict, finally recovered, not defeated as to *firſt* ſalvors, by intermediate ſinking — 323
amount of ſalvage not limited by the *ſum* entered on the warrant — — 323
for reſcue of ſlave ſhip, from inſurgent ſlaves, 101
facts not proved — — *ib.*

T.

Tenders—*how to be* attached to King's ſhips, in order to entitle the King's ſhips to the benefit of their captures—See *Droits.* — — 46, 51, 282
Territory—*ceded*, by treaty but not *ſurrendered*, *unchanged* — 113
violation of, at *St. Michael's*, as contradicted by the evidence in preparatory, *not ſuſtained* — 18
at the mouth of the *Miſſiſſippi*, *proved* 373 & *ſeq.*
reſtitution on the claim of the *American* Government, with coſts and damages — — 385
Trade with the enemy—*obligation*, to counter-order on firſt knowledge of hoſtilities — 256
not enforced, in conſequence of the failure of the *fact*, *by* change of character, previous to arrival — — 254

Treaty—parts *executed*, parts *executory* — — 66
not affected, in the view of the Court, by non-performance of thoſe *executory* — — *ib.*
Amiens, as to *perſons ceded* — — 61
Idelphonſo, for ceſſion of territory in time of war 113
Ruſſian—See *Contraband.* 305 & *ſeq.*
Swediſh—See *Contraband.* — — 152 & 215
expences of bringing in for pre-emption, not falling on the captor — 154

U.

Unlivery—expences on the *captors*, to be afterwards *apportioned* on the cargo — — 89, 90

W.

Wages—to the crew of prize ſhips not *granted* — 9
ſhares in *fiſhing* voyages ſo conſidered, and not as ordinary private adventures — 9
forfeited by deſertion before arrival in port — 227
the *Humber* not conſidered as the port of *Hull*, for this purpoſe — — *ib.*
Witneſs—*incompetent*, from *legal intereſt* — — 344
not, *from opinion* of intereſt, or expectation of bounty — — 344

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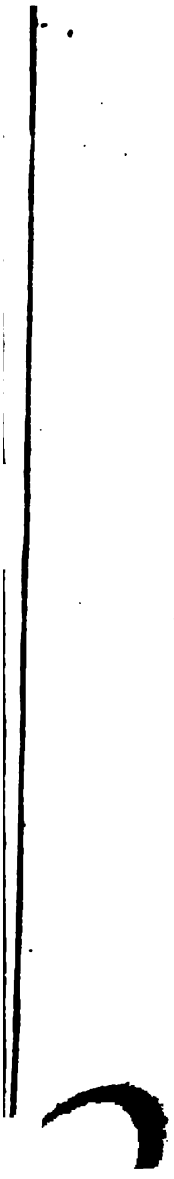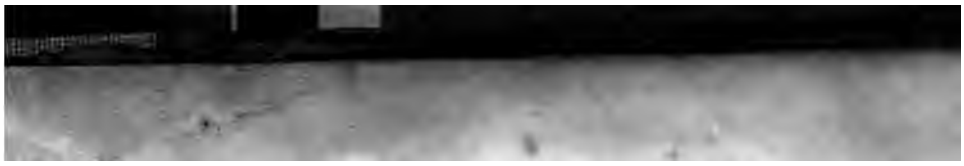
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